CHAPTER 2

PRETRIAL PREPARATION AND PROCEDURE IN FEDERAL LITIGATION

2.1 General.

The pretrial stage of federal litigation with its many procedural rules is generally of greater importance to judge advocates involved in litigation than the procedure related to trial and judgment since many cases terminate before trial, either upon settlement or the success of a dispositive motion. Additionally, the greater demands on judge advocates in the field usually are made at the beginning of litigation and during the discovery phase. This chapter briefly discusses the most significant aspects of the Federal Rules of Civil Procedure (hereafter referred to as the Rules) that relate to the complaint and answer, motions that are intended to cut off the plaintiff as early in the litigation as possible, and discovery. A short discussion of habeas corpus practice follows the section on discovery.

2.2 Beginning the Litigation - Complaint and Answer.

The federal civil action is commenced by the filing of a complaint.[1] "Filing is accomplished by complying with local rules as to delivery of the requisite number of copies of the complaint to the clerk of court's office and having the complaint logged into the court's docket file. A pleading, motion, or

[1]Fed. R. Civ. P. 3. See, e.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Del Raine v. Carlson, 826 F.2d 698 (7th Cir. 1987); Birge v. Delta Air Lines, Inc., 597 F. Supp. 448, 454 (N.D. Ga. 1984) (cases holding complaint, not Title VII right-to-sue letter, commences civil action); compare Lewis v. Richmond City Police Dept., 947 F.2d 733 (4th Cir. 1991) (delivery to prison authorities for mailing to clerk of court constitutes "filing" for confined prisoner).

other paper is not 'filed' until received by the clerk; depositing a document into the mail is not 'filing.'"[2] When the complaint is filed, the applicable statute of limitations generally tolls.[3]

This distinguishes federal practice from that in some other jurisdictions where service of process tolls the limitations period.

Consider the case where the complaint is filed within the statute of limitations, but process is not served until after the statute has run. Some older cases held that the remedy for a delay in service was a motion to dismiss for failure to prosecute under Rule 41(b).[4] Other cases held that Rule 3 was qualified by the service of process rules in Rule 4 and, as a result, failure to make service "nullified" the effect of filing the complaint.[5] <<delete highlighted?>>

Previous questions about the tolling of applicable statutes of limitations were largely resolved by the 1983 statutory change to Rule 4 which mandates dismissal without prejudice on motion or by the court on its own when a defendant is not served within 120 days of the filing of the complaint, absent a showing of good cause.[6]

---

[2]Cooper v. Ashland, 871 F.2d 104 (9th Cir. 1989); Torras-Herreria v. M/T Timur Star, 803 F.2d 215 (6th Cir. 1986).

[3]West v. Conrail, 481 U.S. 35 (1987); Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). In most cases against the United States, the statute of limitations, under 28 U.S.C. § 2401(a), is six years, although shorter periods are provided in specific actions; see, e.g., 28 U.S.C. § 2401(b) with respect to Federal Tort Claims Act actions.

[4]Messenger v. United States, 231 F.2d 328, 332 (2d Cir. 1956).

[5]Hukill v. Pacific & Arctic Ry. & Navigation Co., 159 F. Supp. 571, 575 (D. Alaska 1958).

[6]Fed. R. Civ. P. 4(m); Federal Rules of Civil Procedure Amendments Act of 1982 § 2(7), Pub. L. No. 97-462, 96 Stat. 2527, 2528 (1983). See, e.g., Frasca v. United States, 921 F.2d 450, 453 (2d Cir. 1990) (filing of complaint tolls the running of the statute of limitations for only 120-day period for service provided by Rule 4; complaint was properly dismissed for failure to make service before expiration of

footnote continued next page

The "pleadings" consist only of the complaint and answer, a reply to a counterclaim or answer to a cross-claim, a third-party complaint, and a third-party answer.[7] Under Rule 8(a), the complaint must contain the following elements:

a. a "short and plain statement of the grounds" for jurisdiction,

b. a "short and plain statement of the claim" showing entitlement to relief, and

c. a demand for judgment (relief in the alternative or several different types of relief may be demanded) .

Under the concept of notice pleading on which the federal rules are based, the plaintiff need only state his claim rather than all the facts on which his claim is based, as would be required under traditional notions of code pleading.[8] On the other hand, some factual allegations are necessary to allow the defendant to respond to the complaint.[9] The requirement under Rule 8(a) is best described by Justice Black in Conley v. Gibson,[10] where the Court reversed dismissal of a complaint alleging discrimination against certain African-American railway workers:

(..continued)
the statute of limitations); Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987).

[7]Fed. R. Civ. P. 7(a).

[8]See C. Clark, Handbook of the Law of Code Pleading §§ 8, 35 (2 ed. 1947).

[9]E.g., Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383, 1387 (10th Cir. 1980) (dismissing complaint that only recited law and did not allege any specific facts, therefore providing inadequate notice for responsive pleading).

[10]355 U.S. 41, 47 (1957).

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.[11]

While the complaint in Gibson was challenged for being too succinct and failing to apprise defendants of just what plaintiff thought they did wrong, the following case, filed by a former Assistant U.S. Attorney against the Department of Justice and a U.S. Attorney, illustrates the opposite side of the problem:

WINDSOR v. A FEDERAL EXECUTIVE AGENCY
614 F. Supp. 1255 (M.D. Tenn.)
aff'd, 767 F.2d 923 (6th Cir. 1984)

---

[11]Id. at 48. The Conley case has been criticized as having provided conflicting guideposts on the question of specificity of factual allegations. See e.g., Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994) (court not required to accept legal conclusions case in form of factual allegations if those conclusions cannot be drawn reasonably from the facts); Ascon Properties Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) (dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."); McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988) (conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim).

The rules governing pleading in the federal courts require a complaint to contain ". . . a short and plain statement of the claim . . ." and the averments therein must be " . . . simple, concise, and direct." Rule 8(a)(2), (e)(1), F.R.Civ.P.; see United States v. School Dist. of Ferndale, 577 F.2d 1339, 1345 (6th Cir. 1978). This is the only permissible pleading authorized for filing in a federal district court. Harrell v. Directors of Bur. of Narcotics, Etc., 70 F.R.D. 444, 446[2] (D.C. Tenn. 1975). The complaint herein is deficient.

Mr. Windsor's complaint consists of 11 pages with a 7-1/2 page exhibit appended thereto. He proposes to amend such complaint so as to add thereto five more pages of allegations along with some 24 pages of exhibits. Since exhibits to a pleading are considered a part thereof, Rule 10(c), F.R.Civ.P., the plaintiff offers a complaint containing a total of 47-1/2 pages. This is excessive.

Stripped of its verbosity, Mr. Windsor's claim seems to be that the defendants wronged him, by submitting to the disciplinary arm of the Supreme Court of Tennessee a document containing false information about him and that, as a proximate result thereof, he was damaged and is entitled to be compensated therefor. In the opinion of the Court, it does not require nearly four-dozen pages to state such a relatively simple claim and to outline briefly the legal grounds for recovery.

In addition to its length (and, logically, as a result), the complaint is confusing and distracting; it contains numerous allegations which are irrelevant and otherwise improper. The detailed history of Mr. Windsor's difficulties with his former employer is well-documented, see Windsor v. The Tennessean, 719 F.2d 155 (6th Cir. 1983), and need not be rehashed herein; his earlier lawsuit is a part of the records of this Court and, to the extent such might become relevant herein, the Court can take judicial notice thereof. Rule 201(b), F.R.Evid.; Harrington v. Vandalia-Butler Bd. of Ed., 649 F.2d 434, 441[7] (6th Cir. 1981).

" . . . [T]he purpose of a pleading is to state the ultimate facts constituting the claim or defense relied upon in short and plain terms without pleading the evidence in support of such facts. . . ." Commissioner of Internal Revenue v. Licavoli, 252 F.2d 268, 272[1] (6th Cir. 1958). Thus, it is not required that a plaintiff plead evidentiary matters, Mathes v. Nugent, 411 F. Supp. 968, 972[8] (N.D. Ill. 1976); and " . . . [i]t has long been basic to good pleading that evidentiary matters be deleted. . . ." Control Data Corp. v. International Business Mach. Corp., 421 F.2d 323, 326 (8th Cir. 1970). Mr. Windsor's complaint is replete with evidentiary statements adding nothing but confusion.

> Lastly, the complaint is overly-confusing because the plaintiff has not separated adequately his different claims for relief. Although Rule 10(b), F.R.Civ.P., may not require expressly the use of separate counts in the statement of different theories of recovery, such is often desirable: ". . . Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on [one theory of recovery] are set forth separately from those based on [another theory of recovery]. . . ." O'Donnel v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 392, 70 S.Ct. 200, 205[5], 94 L.Ed. 187 (1949).
>
> In this Circuit, a complaint seeking relief under more than a single statute must set out the different claims separately. Distributing Company v. Gelmore Distilleries, 267 F.2d 343, 345[3] (6th Cir. 1959). ". . . The objective of Rule 8, supra, was to make complaints simpler, rather than more expansive. . . ." Harrell v. Directors of Bur. of Narcotics, Etc., supra, 70 F.R.D. at 445[2], citing Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103[10], 2 L.Ed.2d 80 (1957). Obviously, that objective has not been fulfilled herein, because the complaint does not comply with the requirements of Rule 8, supra.

Pro se complaints, especially those by prisoners, are held to less stringent standards than those prepared by an attorney.[12] These complaints, encountered frequently in Government practice, can be major irritants, especially where courts, unwilling to dismiss them, place the defendant in the position of having to virtually construct a case for the plaintiff in order to set the stage for a successful dispositive motion.

[12]See Hughes v. Rowe, 449 U.S. 5, 10 (1980) (holding that prisoner's pro se civil rights complaint is held to less stringent standards than formal pleadings drafted by lawyers); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (same); Haines v. Kerner, 404 U.S. 519, 520 (1972) (same); Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995) (pro se complaint dismissed for failure to cure defective service remanded for further proceedings in accordance with Fed. R. Civ. P. 4(m)). But see Holsey v. Collins, 90 F.R.D. 122, 128 (D.C. Md., 1981) (holding that even pro se litigants must meet minimum pleading standards). Cf. Graham v. Three or More Members of Six Member Army Reserve General Officer Selection Bd., 556 F. Supp. 669, 671-2 (S.D. Tex. 1983) (holding that pro se lawyer is entitled to only same treatment given to other lawyers).

On the other hand, where a pro se complaint is hopelessly prolix, rambling, or nonspecific, courts will be willing to dismiss.[13] Where the pro se plaintiff is proceeding in forma pauperis the district court can dismiss frivolous complaints sua sponte before service of process on the defendant.[14] In some cases in which pro se plaintiffs repeatedly file the same complaint or frivolous complaints, the court may impose sanctions, such as conditioning the filing of new complaints on the court's prior approval.[15]

Pleadings and motions must be signed, either by an attorney where a party is represented by counsel or by the party where he is acting pro se.[16] Presenting the pleading to the court constitutes a certification by the presenter that, after reasonable inquiry, he knows or believes that: (1) it is not presented for improper purpose; (2) its claims, defenses, and other legal contentions are grounded in existing law or a nonfrivolous extension of it; (3) its factual contentions have evidentiary support or, if specifically so identified, are likely to be supported by discovery; and (4) denials of factual contentions are warranted by the evidence or, if specifically so identified, are reasonably based on lack of information.[17] Sanctions "may" be imposed for violations of the rule. New procedures require service of a sanctions motion on the offending party 21 days prior to filing with the court. Withdrawal of the unwarranted contention during this "safe harbor" period protects the offender from imposition of

---

[13]E.g., United States ex rel. Dattola v. National Treasury Employees Union, 86 F.R.D. 496, 499 (W.D. Pa. 1980).

[14]28 U.S.C. § 1915(e)(2) (1999); Phillips v. Mashburn, 746 F.2d 782, 785 (11th Cir. 1984); Franklin v. Murphy, 745 F.2d 1221, 1229-30 (9th Cir. 1984). However, a complaint filed in forma pauperis is not automatically frivolous so as to warrant sua sponte dismissal under § 1915(d) (statutory predecessor to § 1915(e)(2)) because it fails to state a claim under Rule 12(b)(6). Neitzke v. Williams, 490 U.S. 319 (1989).

[15]E.g., Demos v. Kincheloe, 563 F. Supp. 30 (E.D. Wash 1982); In re Green, 669 F.2d 779 (D.C. Cir. 1981); McDonald v. Hall, 610 F.2d 16 (1st Cir. 1979).

[16]Fed. R. Civ. P. 11(a).

[17]Fed. R. Civ. P. 11(b).

sanctions.[18] Sanctions shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The rule, if imposed pursuant to motion and warranted for effective deterrence, allows for a party to recover some or all of the cost of responding to a frivolous motion.

The complaint may be amended at any time before service of the answer or thereafter with the court's permission or with the consent of the other party.[19]

Where the defendant is the United States, a federal agency, or a federal officer sued in his official capacity, an answer or a motion to dismiss or for summary judgment (or other motion under Rule 12) must be served within 60 days after service of the complaint on the U.S. Attorney.[20] Otherwise, the time for service of the answer is 20 days, unless service of summons has been timely waived by the defendant pursuant to Rule 4(d), in which case he shall have 60 days to serve an answer.[21] If a Rule 12 motion is filed and denied, the answer must be filed 10 days after notice of denial.[22]

Where the United States fails to timely answer, it remains exceptionally difficult for a plaintiff to obtain a default judgment[23] against the Government, especially where a dispositive motion is filed shortly after the answer date.[24]

---

[18]Fed. R. Civ. P. 11(c)(1)(A).

[19]Fed. R. Civ. P. 15(a).

[20]Fed. R. Civ. P. 12(a)(3).

[21]Fed. R. Civ. P. 12(a) and 4(d)(3). Cf. Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (holding that Government agents sued as individuals, as well as in their official capacities, are entitled to 60 days to respond).

[22]Fed. R. Civ. P. 12(a)(4)(A).

[23]See Fed. R. Civ. P. 55e ("No judgment by default shall be entered against the United States…unless the claimant establish a claim or right to relief by evidence satisfactory to the Court.")

Rule 8(b) states the general requirements for the answer:

> Defenses; Forms of Denial. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

Generally, the answer consists of numbered paragraphs corresponding to those of the complaint. In each paragraph, the specific allegations of the complaint are admitted or denied, or a lack of knowledge or information sufficient to form a belief as to the truth of the allegations is asserted, as required by Rule 8(b). Nonfactual allegations, such as jurisdictional allegations, are usually answered by the statement that no response is required, but to the extent that the averment is an allegation of fact, it is denied, if appropriate.

Following admissions, denials, and qualifications of the plaintiff's allegations, the defendant enters whatever additional factual averments are necessary to the defense. Previous statements may be incorporated by reference.[25] A general denial usually follows thereafter, to the effect that any averment not admitted, denied, or otherwise qualified is denied. The general denial protects against the penalty of

---

(..continued)

[24] E.g., Ross v. United States, 574 F. Supp. 536, 538 (S.D.N.Y. 1983).

[25] See Fed. R. Civ. P. 10(c).

Rule 8(d) which provides that averments not denied are admitted. What happens where a defendant neither admits or denies an allegation but rather claims privilege? In National Acceptance Company of America v. Bathalter,[26] the Seventh Circuit held that Rule 8(d) will not operate in this circumstance. Consequently, the failure to deny will not be treated as an admission.

The last part of the answer is the listing of affirmative defenses and the defendant's request for judgment.

In addition to Rule 12(b) defenses which must be raised in the answer or by motion,[27] Rule 8(c) requires that all affirmative defenses be pleaded in the answer. The rule lists 19 specific affirmative defenses which must be pleaded.[28] Other affirmative defenses that some courts have held should be listed include the unconstitutionality of a statute,[29] that an official was not acting in his official capacity when the act which is complained of occurred,[30] personal immunity defenses,[31] and absolute immunity.[32]

---

[26]705 F.2d 924, 932 (7th Cir. 1983) (claim of Fifth Amendment privilege may not be deemed an admission); see also LaSalle Bank Lakeview v. Seguban, 54 F.3d 387 (7th Cir. 1995) (court could not base summary judgment action on former employee's invocation of Constitutional rights).

[27]See Fed. R. Civ. P. 12(b).

[28] The affirmative defenses listed in Rule 8(c): are accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury to fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver. The rule also requires the assertion of "any other matter constituting an avoidance or affirmative defense."

[29]Butts v. Curtis Publishing Co., 225 F. Supp. 916, 920 (N.D. Ga. 1964), aff'd, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130 (1967).

[30]Willie v. Harris County, 202 F. Supp. 549, 552-553 (S.D. Tex. 1962).

[31]Perkins v. Cross, 562 F. Supp. 85, 87-88 (E.D. Ark. 1983) , citing Gomez v. Toledo, 446 U.S. 635, 640 (1980) (order vacated as to attorneys' s fees at 728 F.2d 1099 (8th Cir. 1984).

[32]Green v. James, 473 F.2d 660, 661 (9th Cir. 1973).

Although affirmative defenses ordinarily must be raised in the answer and not by a pre-answer motion to dismiss,[33] there are circumstances under which an affirmative defense may be asserted in a motion to dismiss.[34] But a failure to raise affirmative defenses in a pre-answer motion to dismiss does not result in their waiver.[35]

Affirmative defenses not raised are generally waived.[36] If the defendant later introduces evidence of the affirmative defense and plaintiff fails to object, the defense may be revived.[37]

---

[33]See infra § 2.4.

[34]See, e.g., Scott v. Kuhlmann, 746 F.2d 1377, 1379 (9th Cir. 1984) (holding that defendant may raise affirmative defense in motion to dismiss when defense raises no disputed question of fact); Swift v. United States Border Patrol, 578 F. Supp. 35 (S.D. Tex. 1983), aff'd, 731 F.2d 886 (5th Cir. 1984) (defense clearly appears on face of complaint).

[35]Birge v. Delta Airlines, Inc. 597 F. Supp. 448, 450-52 (N.D. Ga. 1984).

[36]E.g., Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990) (in FTCA action, failure by United States to assert Louisiana Malpractice Act's limitations on damages ("damages cap") as affirmative defense waives such defense); Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp., 684 F.2d 1383, 1386 (11th Cir. 1982) (failure to raise defense of equitable estoppel by pleading or pretrial motion waives the defense); Depositors Trust Co. v. Slobusky, 692 F.2d 205, 208-209 (1st Cir. 1982) (contract defenses not asserted in pleadings or any pretrial motions deemed waived). Cf. Harris v. Secretary, Dep't of Veterans Affairs, 126 F.3d 339, 345 (D.C. Cir. 1997) (holding that a party must first raise affirmative defenses in a responsive pleading before it can raise them in dispositive motion). But see Blaney v. United States, 34 F.3d 509, 512 (7th Cir. 1994) (United States's failure to plead statute of limitations in answer not waiver where it was raised in motion to dismiss and the district court chose to recognize the defense).

[37]Jones v. Miles, 656 F.2d 103, 107 n.7 (5th Cir. 1981). See also Allied Chemical Corp. v. MacKay, 695 F.2d 854 (5th Cir. 1983); Standridge v. City of Seaside, 545 F. Supp. 1195 (N.D. Cal. 1982). But see Ross v. United States, 574 F. Supp. 536, 539 (S.D.N.Y. 1983) (citing Rowley v. McMillan, 502 F.2d 1326, 1332-33 (4th Cir. 1974)) (defense not raised cannot be revived by amending complaint).

Another instance where an affirmative defense remains viable despite failure to include it in the answer is where it is jurisdictional. An example is the FTCA statute of limitations. By statute, an FTCA action can be brought only where a claim has been timely filed. Because this filing requirement is part of the statutory description of the cause of action, a failure to file in time is jurisdictional and can be raised at any time.[38]

Even where existing case law does not favor a defense, it should be raised so that it will be available should the law change.[39]

2.3 Pretrial Conferences - Rule 16.

Rule 16 permits the court in its discretion to hold a pretrial conference with the parties. Pretrial conferences have been thought of as a procedural step just before trial. Increasingly, the pretrial conference is playing a significant role as a case management tool early in the litigation.

The Federal Rules contemplate that this pretrial conference would occur after a required meeting of the parties provided by Rule 26(f). The Rule 26(f) meeting (see discussion in § 2.6 below) is a mandatory meeting between or among the parties which is to occur"[as] soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)."[40] The purposes of the Rule 26(f) meeting include to "meet to discuss the nature and basis

[38]Ippolito-Lutz, Inc. v. Harris, 473 F. Supp. 255 (S.D.N.Y. 1979); Perkins v. United States, 76 F.R.D. 593 (W.D. Okla. 1976).

[39]Cf. Zets v. Scott, 498 F. Supp. 884 (W.D.N.Y. 1980) (failure to raise lack of personal jurisdiction because of prior incorrect circuit interpretation of limits of in rem jurisdiction under Shaeffer v. Heitner, 433 U.S. 186 (1977), resulted in waiver).

[40]See Fed. R. Civ. P. 26(f).

of [the parties] claims and defenses and the possibilities for a prompt settlement or resolution of the case," to make disclosures required by Rule 26(a) (discussed below in § 2.6), and to "develop a proposed discovery plan."[41] Rule 26 provides detailed guidance about the types of matters that should be included in a proposed discovery plan, and judge advocates who are participating in discovery must understand its provisions, check for any Local Rule of court counterpart, and consult with their lead litigating counsel to determine required agency litigation support.

Amendments to Rule 16 in 1983 and 1993 make scheduling and case management express goals of pretrial procedure.[42] While leaving a good deal of discretion in the court as to the use of pretrial conferences, Rule 16(b) nevertheless mandates the judge (or magistrate when authorized by local rule) to enter a "scheduling order" that limits the time for amendments to pleadings, filing of motions, and completion of discovery. The order follows the Rule 26(f) meeting and any other informal consultation with the parties by telephone, mail, or meeting. Because the scheduling order ordinarily will issue within 90 days after a defendant first appears and within 120 after the complaint has been served on the defendant, judge advocates can expect their cases in litigation to be subject to tighter judicial control than would otherwise be the case. In the event that a party disobeys a scheduling order or any other pretrial order, Rule 16(f) allows the judge to impose sanctions, including those available for disobedience to discovery orders[43] and expenses incurred as a result of the party's noncompliance.[44]

The pretrial conference is a potent device for the court and the parties. Conference participants may consider and take action to eliminate frivolous claims or defenses, or dispose of issues

---

[41] Id.

[42] See Fed R. Civ P. 16 advisory committee note.

[43] See infra § 2.6, and see In Re Novak, 932 F.2d 1397, 1403 (11th Cir. 1991); G. Heilman Brewing Co., v. Joseph Oat Corp., 871 F.2d 648, 650 (7th Cir. 1987).

[44] See Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 869 (3d Cir. 1984).

without having to go through a motion to dismiss or for summary judgment discussed below. Moreover, if a party fails to identify an issue for the court at the pretrial conference, the right to have the issue tried is waived.[45]

2.4 Dismissing the Complaint - Rule 12(b).

Before answering the complaint, the defendant may file a motion under Rule 12(b) on one of the following seven grounds:

12(b)(1) lack of subject matter jurisdiction,

12(b)(2) lack of personal jurisdiction,

12(b)(3) improper venue,

12(b)(4) insufficiency of process,

12(b)(5) insufficiency of service,

12(b)(6) failure to state a claim, and

12(b)(7) failure to join an indispensable party under Rule 19.

The defendant may decide not to move to dismiss and answer instead. By doing so, no defense is waived so long as it is asserted in the answer. Nevertheless, the rules contemplate that only

[45]Fed. R. Civ. P. 16 advisory committee note.

one motion to dismiss will be filed and that it be filed before answering.[46] Some authority, and certainly language in the Rule itself, suggests that filing the answer does not preclude filing a post-answer motion to dismiss.[47] Defenses listed in Rule 12(b)(1)-(7) cannot be raised piecemeal in several motions.[48] Moreover, if the defendant moves to dismiss, a failure to include any one of the grounds (b)(2)-(b)(5) (personal jurisdiction, venue, process, service) waives that ground forever.[49] Once made and decided, a motion cannot be amended (and renewed) to add new grounds for dismissal.[50] The remaining grounds (subject matter jurisdiction, failure to state a claim, failure to join a party) are not waived by failure to raise them in the motion.[51]

Rather than looking at each separate ground for dismissal in turn, we should first examine lack of subject matter jurisdiction[52] and failure to state a claim[53] together because they are perhaps the most important and because they are frequently and incorrectly used interchangeably. After discussing these two grounds, we can turn to the others.

a. Rule 12(b)(1), 12(b)(6): Subject Matter Jurisdiction and Failure to State a Claim.

---

[46] See Rule 12(b), which states in pertinent part: "a motion making any of these defenses shall be made before pleading if further pleading is permitted."

[47] E.g., Birge v. Delta Air Lines, Inc., 597 F. Supp. 448, 450 (N.D. Ga. 1984). Rule 12(b) provides, in pertinent part: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."

[48] Fed. R. Civ. P. 12(g).

[49] Fed. R. Civ. P. 12(h)(1)(A).

[50] Myers v. American Dental Ass'n, 695 F.2d 716, 720-21 (3d Cir.), cert. denied, 462 U.S. 1106 (1983).

[51] Fed. R. Civ. P. 12(h)(2, 3).

[52] Fed. R. Civ. P. 12(b)(1).

[53] Fed. R.Civ. P. 12(b)(6).

Lack of subject matter jurisdiction is never waived.[54] The court has the obligation to consider the issue sua sponte whenever it appears to be raised.[55] Although failure to state a claim is not waived by failing to include it in a 12(b) motion, it is waived if not asserted at trial.

As § 2.2 indicates above, the plaintiff must state the grounds for jurisdiction. This requirement is usually met by citing an independent statutory basis for jurisdiction,[56] and sufficient facts to demonstrate a nexus between the jurisdictional statute and the claim. Failure to cite a jurisdictional statute is not fatal if the facts pleaded demonstrate that jurisdiction exists.[57] If the claim itself, however, is wholly insubstantial or frivolous, it can be dismissed for lack of jurisdiction even if a statutory basis for jurisdiction is set out.

The 12(b)(6) motion tests the formal sufficiency of the plaintiff's claim. The claim is dismissed only where plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[58]

---

[54]United States v. Griffen, 303 U.S. 226, 229 (1938); Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 266 (2d Cir. 1996); In Re Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994); see also Fed. R. Civ. P. 12(h).

[55]Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 740 (1976); Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 266 (2d Cir. 1996); Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993).

[56]See § 3.3 infra.

[57]Scheuer v. Rhodes, 416 U.S. 232, 234 n.2 (1974).

[58]Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Carter v. Cornwell, 983 F.2d 52 (6th Cir. 1993) (dismissal is proper when there is no set of facts which would allow plaintiff to recover); Ascon Properties Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) (dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."); McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988) (conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim); District of Columbia v. Air Florida, Inc. 750 F.2d 1077, 1081-82 (D.C. Cir. 1984).

As discussed above, a frivolous claim is dismissed for lack of jurisdiction where, for example, the allegations bear no relation to a federal question where that is the alleged basis for jurisdiction. On the other hand, a claim that is substantial enough to demonstrate the existence of jurisdiction may still be subject to a 12(b)(6) dismissal where the allegations, fully proven, would fall short of entitlement to relief.

The difference between motions under 12(b)(1) and 12(b)(6) is often blurred. The kinds of issues appropriate to each kind of motion are frequently confused by counsel and the courts.[59]

Whether there is a case or controversy as required by Article III is a 12(b)(1) ground. The case or controversy requirement is "designed to screen out cases seeking answers to abstract legal questions."[60] It includes standing ("whether the plaintiff has 'alleged such a personal stake in the outcome' . . . as to warrant his invocation of federal jurisdiction"), ripeness ("whether the harm asserted has matured sufficiently to warrant judicial intervention"), and mootness ("whether the occasion for judicial intervention persists").[61]

If there is no case or controversy under Article III, the case is said to be nonjusticiable. There are, however, other issues which relate to nonjusticiability. For example, a matter exclusively committed by the Constitution to a coordinate branch of government is nonjusticiable.[62] Hence, in Gilligan v. Morgan,[63] the type of training, weapons, and equipment of the Army National Guard was a

---

[59]Johnsrud v. Carter, 620 F.2d 29, 32 (3d Cir. 1980), citing Montana Dakota Co. v. Public Serv. Co., 341 U.S. 246, 249 (1951).

[60]Gulf Publishing Co. v. Webb, 679 F.2d 44 (5th Cir. 1982). See infra § 3.4.

[61]See infra § 3.4.

[62]See infra.§ 3.4c.

[63]413 U.S. 1 (1973).

nonjusticiable issue. In that situation, there was a case or controversy, but the issue was nonjusticiable because the issue involved a matter exclusively committed to Congress and the Executive. Where a case or controversy exists, but an issue is otherwise nonjusticiable, then it is dismissed for failure to state a claim under 12(b)(6) rather than lack of jurisdiction under 12(b)(1).[64] Baker v. Carr, the reapportionment case in which the Supreme Court provided the definitive explanation of the political question doctrine, also provides the best explanation of the difference between 12(b)(1) and 12(b)(6) in questions relating to justiciability:

BAKER v. CARR
369 U.S. 186 (1962)

Mr. Justice Brennan delivered the opinion of the Court.

> This civil action was brought under 42 U.S.C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that . . . "these plaintiffs and others similarly situated, are denied . . . equal protection . . . by virtue of the debasement of their votes," was dismissed by a three-judge court. . . . The court held that it lacked jurisdiction of the subject matter and also that no claim

[64]Id.; see Johnsrud v. Carter, 620 F.2d 29 (3d Cir. 1980). Johnsrud involved plaintiffs seeking an injunction commanding the United States to post certain warnings after the Three Mile Island radiation accident. In holding that the District court should not have dismissed the action for lack of jurisdiction because the political question doctrine was involved, the Circuit court offered the following analysis on the interplay between Rule 12(b)(1) and Rule 12(b)(6):

> It may be as the Government asserts, that the alleged inaction here is not unlawful or unreasonable. That, however, is not properly a jurisdictional matter, but a consideration that goes to the merits of the case. It requires a case-by-case determination that must be made on the facts of the particular case. Accordingly, although such matters may be appropriate for resolution on a motion to dismiss for failure to state a claim or a motion for summary judgment, both of which go to the merits, it is not appropriate for resolution on a Rule 12(b)(1) motion to dismiss for subject matter jurisdiction (citations omitted).

Johnsrud, 620 F.2d at 31. See also 5A Wright & Miller: Federal Practice & Procedure § 1350 (Rule 12) (1989 ed.).

was stated upon which relief could be granted. 179 F. Supp. 824. . . . We hold that the dismissal was error. . . .

The District Court's Opinion and Order of Dismissal.

Because we deal with this case on appeal from an order of dismissal granted on appellees' motions, precise identification of the issues presently confronting us demands clear exposition of the grounds upon which the District Court rested in dismissing the case. The dismissal order recited that the court sustained the appellee's grounds "(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted. . . ."

In the setting of a case such as this, the recited grounds embrace two possible reasons for dismissal:

First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;

Second: That, although the matter is cognizable and facts are alleged which establish infringement of appellants' rights as a result of state legislative action departing from a federal constitutional standard, the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.

We treat the first ground of dismissal as "lack of jurisdiction of the subject matter." The second we consider to result in a failure to state a justiciable cause of action. . . .

In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which the appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. . . .

Jurisdiction of the Subject Matter.

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration--what we have designated "nonjusticiability." The distinction between the two grounds is significant. In the

> instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the three enumerated categories of Art. 3 § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute. Our conclusion . . . that this cause presents no nonjusticiable "political question" settles the only possible doubt that it is a case or controversy. Under present heading of "Jurisdiction of the Subject Matter" we hold only that the matter set forth in the complaint does arise under the Constitution and is within 28 U.S.C. § 1343.

Nonjusticiability is an issue that is raised with some frequency in litigation involving the United States and the distinction between 12(b)(1) and 12(b)(6) in this area is helpful to keep in mind.[65] Another issue frequently raised in military litigation and related in some degree to nonjusticiability is whether the courts should defer to the military on peculiarly military issues. These issues of "nonreviewability" are also raised under 12(b)(6).[66] Both nonjusticiability and nonreviewability will be discussed again in greater detail in chapters 3 and 6.

Where exhaustion of administrative remedies is part of a statutory remedy, it is clearly jurisdictional. An example is the Federal Tort Claims Act, which, pursuant to 28 U.S.C. § 2675, requires the filing of an administrative claim prior to bringing suit.[67] Similarly, statutes of limitation in favor of the United States may also be jurisdictional.[68]

---

[65]See, e.g., Powell v. McCormack, 395 U.S. 486 (1969); Johnsrud v. Carter, 620 F.2d 29, 31 (3d Cir. 1980).

[66]See Mindes v. Seaman, 453 F.2d 197, 201-202 (5th Cir. 1971). Cf. Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981) (disapproving Mindes test for determining justiciability of claims brought against military).

[67]See Lunsford v. United States, 570 F.2d 221, 224 (8th Cir. 1977); Blain v. United States, 552 F.2d 289. 291 (9th Cir. 1977); Molinari v. United States 515 F.2d 246, 249 (5th Cir. 1975); Best Bearings

footnote continued next page

Exhaustion that is not required as part of a statutory remedy may or may not be jurisdictional.[69] Exhaustion has been called a "long settled rule of judicial administration" by Justice Brandeis.[70] This suggests that it is nonjurisdictional and subject to a 12(b)(6) motion. Some courts apparently take that view.[71] Yet, even post-Darby, there is some authority for a special, military rule requiring exhaustion.[72] If exhaustion is viewed as an element of ripeness, then making it a 12(b)(1) issue makes sense. If it is a matter of judicial economy, however, that result is questionable. Courts often hedge the issue, dismissing for exhaustion without stating whether it is for lack of jurisdiction or for

---

(..continued)
v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971); Jayson, Handling Federal Tort Claims § 135 (1984).

[68]E.g., June v. Sec'y of Navy, 557 F. Supp. 144 (M.D. Pa. 1982) (construing 28 U.S.C. § 2401, 6-year statute of limitations for commencing civil actions against the United States).

[69]Bowen v. Massachusetts, 487 U.S. 879 (1988); Darby v. Cisneros, 509 U.S. 137 (1993) (holding that, absent a statutory or regulatory provision requiring exhaustion, a district court may not require exhaustion of administrative remedies as a jurisdictional prerequisite in suits brought under the APA).

[70]Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938).

[71]E.g., Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

[72]E.g., Saad v. Dalton, 846 F. Supp. 889, 891 (S.D. Cal. 1994) (distinguishing Darby v. Cisneros and holding that review of military personnel cases is a "unique context with specialized rules limiting judicial review"). For conflicting historical treatment of the issue, see Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Hodges v. Callaway, 499 F.2d 417, 421, 423-24 (5th Cir. 1974) (holding that failure to exhaust administrative remedies necessarily deprives court of jurisdiction); Champagne v. Schlesinger, 506 F.2d 979, 982 (7th Cir. 1974) (holding that exhaustion doctrine goes not to jurisdiction of trial court, but to its judicial discretion). See generally Wright, Miller & Cooper, Federal Practice and Procedure: Civil § 1350 (1969 & Supp. 1983); Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483 (1969); infra chapter 5.

failure to state a claim, often categorizing exhaustion as an independent ground. Often these dismissals are based on shotgun motions that allege 12(b)(1) and 12(b)(6) as grounds to dismiss.[73]

Two final issues that bear brief mention are sovereign immunity (discussed in chapter 4) and official immunity (discussed in chapter 9). Although sovereign immunity has been called an affirmative defense,[74] it is clearly jurisdictional.[75] Official immunity, the major defense of an individually-sued Government employee, does not deprive the court of jurisdiction but does bar recovery against the defendant. Because it is an affirmative defense, it should be raised in the answer and not in a motion to dismiss. The viability of the defense will be determined in a motion for judgment on the pleadings or for summary judgment.[76]

Whether the motion is brought under 12(b)(1) or 12(b)(6), the allegations of the complaint are assumed to be true for the purposes of the motion when it is first filed.[77] An attack on the face of the complaint thus favors the plaintiff:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support claims. . . .

---

[73]See, e.g., Bard v. Seamans, 507 F.2d 765, 767 n. 2 (10th Cir. 1974).

[74]E.g., Green v. James, 473 F.2d 660, 661 (9th Cir. 1973).

[75]E.g., United States v. Testan, 424 U.S. 392, 399 (1976); Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981).

[76]See In re Jackson Lockdown/MCO Cases, 568 F. Supp. 869 (E.D. Mich. 1983). But cf. Swift v. United States Border Patrol, 578 F. Supp. 35 (S.D. Tex. 1983), aff'd, 731 F.2d 886 (5th Cir. 1984) (where affirmative defense is inadvertently pleaded by plaintiff in complaint, motion to dismiss under Rule 12(b)(6) is appropriate).

[77]Warth v. Seldin, 422 U.S. 490 (1975).

> [I]n passing on a motion of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegation of the complaint should be construed favorably to the plaintiff.[78]

In a 12(b)(1) motion, the defendant can prove lack of jurisdiction by extrinsic evidence.[79] In this instance, the motion becomes a "speaking" motion. The evidence is not weighted factually but collected to see if the record supports subject matter jurisdiction.[80] If extrinsic evidence is introduced in connection with a 12(b)(6) motion, the motion is converted to one for summary judgment under Rule 56, which is discussed in section 2.5 below.

Attempting to fashion a motion under either 12(b)(1) or 12(b)(6) has substantive importance. Dismissal under 12(b)(1) is not with prejudice. Even if extrinsic evidence is introduced on the 12(b)(1) motion, the disposition "is not on the merits and permits the plaintiff to pursue his claim in the same or in another forum."[81] On the other hand, dismissal under 12(b)(6) may be with prejudice. If extrinsic evidence is introduced and the defendant wins the motion as one for summary judgment, then there has been a final adjudication on the merits which eliminates the possibility of future suit.[82] Even if the dismissal is ordered purely for failure to state a claim without conversion to summary judgment, some

---

[78]Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

[79]Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980), reh'g denied, 622 F.2d 1043 (5th Cir. 1980), cert. denied, 449 U.S. 953 (1980). But see Haase v. Sessions, 835 F.2d 902, 908 (D.C. Cir. 1987) (where only the court could elicit information outside the pleadings).

[80]Haase v. Sessions, 835 F.2d 902, 910 (D.C. Cir. 1987).

[81]Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977). But cf. Czeremcha v. Machinists and Aerospace Workers, 724 F.2d 1552, 1555 (11th Cir. 1984) (although dismissal of complaint terminates right to amend, motion to amend complaint to cure jurisdictional defect should be liberally granted).

[82]See Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1156-1160 (5th Cir. 1981), cert. denied, 483 U.S. 1020 (1987) (reproduced in part at *infra* § 2.5).

courts have held it to be a decision on the merits and applied res judicata to attempts to bring a similar action.[83] It is, therefore, to the defendant's advantage to seek dismissal under 12(b)(6) rather than 12(b)(1).

Where there is no subject matter jurisdiction, the court has a mandatory duty to dismiss. When determining whether there is subject matter jurisdiction, the court can assume that a cause of action is stated.[84] If the court finds a lack of jurisdiction, then it cannot reach the merits. Thus, where lack of jurisdiction is asserted along with a failure to state a claim, the court arguably is foreclosed from deciding the 12(b)(6) ground if the 12(b)(1) ground is meritorious.[85]

The Seventh Circuit noted the importance of distinguishing between 12(b)(1) and 12(b)(6) motions in a case brought by a veteran challenging the Veterans Administration decision to reduce his disability benefits:

WINSLOW v. WALTERS
815 F.2d 1114 (7th Cir. 1987)

> This case comes to us in an awkward procedural posture. The Veterans Administration sought dismissal on two distinct grounds: that the district court lacked subject matter jurisdiction and that the plaintiff had failed to state a claim on

[83]E.g., Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965), cert. denied, 383 U.S. 919 (1965); Bartsch v. Chamberlin Co., 266 F.2d 357 (6th Cir. 1959). Contra Chase v. Rieve, 90 F. Supp. 184, 187 (S.D.N.Y 1950).

[84]Burks v. Lasker, 441 U.S. 471, 476 n. 5 (1979).

[85]Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 513 (5th Cir. 1980), reh'g denied, 622 F.2d 1043 (5th Cir. 1980), cert. denied, 449 U.S. 953 (1980); Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993). But see Wheeler v. Hurdman, 825 F.2d 257, 259-60 (10th Cir. 1987), cert. denied, 484 U.S. 986 (1987) (if the jurisdictional question is intertwined with the merits of the case, it should be resolved under 12(b)(6) and converted thereafter to a motion for summary judgment where extraneous evidence is introduced).

which relief could be granted. However, the VA combined both grounds in a Rule 56(b) motion for summary judgment. This was incorrect.

A party may move to dismiss for failure to state a claim under either Rule 12(b)(6) or, where the movant asks the court to consider materials outside the pleadings, under Rule 56. However, a party may move to dismiss for lack of subject matter jurisdiction only under Rule 12(b)(1). There is good reason for requiring parties to plead these motions differently. A ruling that a party has failed to state a claim on which relief may be granted is a decision on the merits with full res judicata effect. A party may therefore seek summary judgment, which is on the merits, on this issue. In contrast, a ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits; its res judicata effect is limited to the question of jurisdiction. See Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931). Seeking summary judgment on a jurisdictional issue, therefore, is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur. See generally Exchange National Bank v. Touche Ross, 544 F.2d 1126, 1330-31 (2d Cir. 1976) (discussing the relationship among Rules 12(b)(6), and 56).

In this case, summary judgment was incorrectly granted against the plaintiff on the issue of whether the court had jurisdiction. The error was compounded by the granting of summary judgment on the remainder of the VA's motion, including the question of whether Winslow had stated a claim on which relief could be granted, even though the court apparently did not consider this issue.

The VA should have moved for dismissal for want of jurisdiction under 12(b)(1) and, in the alternative, for failure to state a claim under 12(b)(6). See Fed.R.Civ.P. 12(g) (consolidation of defenses in a motion). The district court would then have first considered whether it had jurisdiction. Had the court found that it had jurisdiction, it would then have considered the VA's motion asserting that the plaintiff had failed to state a claim. If the court found that Winslow had not stated a claim, it could have granted summary judgment. For the purposes of our review, we will treat the VA's motion as if it had been properly pleaded and assess the two grounds for dismissal.

. . .

---

b. Rule 12(b)(2), (4), (5): Personal Jurisdiction and Insufficiency of Process and Service.

Each of these grounds deal in some way with personal jurisdiction. Analysis begins with Rule 4 which provides for the form and manner of service of process.

Process consists of the summons and complaint. If the process does not contain all that is required under Rule 4(a) (such as who the plaintiff and defendant are, what the full title of the action is, etc.), then the process is improper and a motion under 12(b)(4) for improper process is arguably proper. However, 12(b)(4) motions are rare and disfavored. Courts are willing to overlook minor defects.[86] A motion under 12(b)(5) for failure to make effective service is likely to be more successful. If there is a defect in process or insufficiency of service, courts will generally allow amendment under Rule 4(a) and new service unless there has been "material prejudice to any substantial rights of the complaining defendant."[87]

A motion for insufficiency of service is appropriate where service is not executed in accordance with Rule 4(i). Rule 4(i) provides that service on the United States is accomplished by (1) delivering or mailing, by registered or certified mail, a copy of the summons and complaint to the U.S. attorney and (2) mailing, by registered or certified mail, a copy of the summons and complaint to the Attorney General. Serving the Attorney General but failing to serve the U.S. attorney (or vice-versa) is a ground for dismissal for lack of personal jurisdiction.[88] Where an officer (in his official capacity) or agency is sued, the defendant is served by registered or certified mail and the United States is served as though it were a party. Under 28 U.S.C. § 1391(e), service upon an officer or agency may be made by

---

[86]E.g., Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980); Smith v. Boyer, 442 F. Supp. 62 (W.D.N.Y. 1977); Vega Matta v. Alvarez, 440 F. Supp. 246 (D.P.R. 1977), aff'd, 577 F.2d 722 (1st Cir. 1978).

[87]Hawkins v. Department of Mental Health, 89 F.R.D. 127 (W.D. Mich. 1981).

[88]E.g., George v. United States Dep't of Labor, 788 F.2d 1115 (5th Cir. 1986) (failure to serve Attorney General). But cf. Jordan v. United States, 694 F.2d 833 (D.C. Cir. 1982) (failure to serve U.S. attorney not ground for dismissal where U.S. Marshal's Service erroneously failed to deliver process to U.S. Attorney).

mail nationwide. Nationwide mail service on officials sued individually is not permitted under § 1391(e).[89] Service proceeds as it would against any individual defendant.[90]

Paragraph 1-7b(2), Army Regulation 27-40, says that commanders and other Army officials will not prevent or evade service of process in legal actions brought against the United States or themselves concerning their official duties. To avoid interference with duties, a commander or other official may designate a representative to accept service in his stead.[91] Paragraph 1-7b(3)(a), AR 27-40, allows installation commanders to impose reasonable restrictions upon persons who enter their installations to serve process.

Rule 4(e) permits service on individual defendants in the United States in one of three ways:

1. in any way permitted by the law of the state where the court is located;[92]

2. by delivery within the state to the defendant personally, to a person of suitable age and discretion at the defendant's home, or to an agent authorized to receive process for the defendant; or

---

[89]Stafford v. Briggs, 444 U.S. 527, 535-36 (1980); Micklus v. Carlson, 632 F.2d 227, 240-41 (3d Cir. 1980).

[90]Stafford, 444 U.S. at 535-36; Micklus, 632 F.2d at 240-41; see also Navy, Marshall & Gordon v. United States Inter. Dev. Coop. Agency, 557 F. Supp. 484, 489-90 (D.D.C. 1983). Cf. Lawrence v. Acree, 79 F.R.D. 669, 670-71 (D.D.C. 1978) (holding that when suit is premised on actions unrelated to defendant's duties as federal officer, United States need not be served).

[91]See, e.g., DOD Directive 5530.1, Service of Process in the Department of Defense (Aug. 22, 1983) (codified in 32 C.F.R. §§ 257.1-5 (1995)) (delegating authority to accept service on behalf of the service secretaries and the Secretary of Defense).

[92]Service on defendants outside the district in which the court is located must be authorized by the state long arm statute. Omni Capital Inter. v. Rudolf Wolff & Co., 484 U.S. 97, 108 (1987).

3. by any way authorized by federal law (e.g., 15 U.S.C. §§ 7v(a) (1987)).

Other provisions in Rule 4, not very relevant here, deal with service on infants, incompetents, business organizations, states and municipalities, and service based on in-rem jurisdiction. Service is made by a nonparty who is 18 or older. Generally, U.S. marshals will make service for private parties only when ordered to do so by a court.

The 1993 amendment to the Federal Rules of Civil Procedure added a waiver-of-service provision at Rule 4(d). This new provision provides that a plaintiff may notify a defendant in writing, dispatched through first class mail or other reliable means, of the commencement of the action and request that the defendant waive service of a summons. The plaintiff must use text prescribed in an official form promulgated pursuant to Rule 84 for this purpose. The defendant has a reasonable time, at least 30 days from the date the request is sent, to return the waiver. The defendant who waives service of process in this manner does not waive objections to venue or personal jurisdiction, and then has 60 days from the date the request was sent to serve an answer. The defendant who fails to comply with a request for waiver may be liable for subsequently incurred costs of service. Entry of a default judgment should not be a proper remedy for a defendant's failure to waive service.[93]

The waiver-of-service procedures in Rule 4(d) do not apply to the United States, federal agencies, or federal officials (in their official capacities) as defendants.[94]

The waiver-of-service provision added by the Act is separate from the independent authority to make service in accordance with state law. If a plaintiff attempts a Rule 4(d) waiver of service and it

[93]Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc., 733 F.2d 1087, 1089 (4th Cir. 1984).

[94]Fed. R. Civ. P. 4(d)(2).

is refused, case law indicates that service under a state statute is no longer permissible. The litigant must use the federally prescribed personal service.[95]

When a plaintiff does not use the federal methods, state procedures for in-state service and any long-arm statute of the state can be employed to obtain personal jurisdiction. Both the manner of service specified in the state statute and its substantive provisions describing minimum contacts between the defendant and the state are incorporated. If the minimum contacts provided for by the statute are so tenuous as to deny due process,[96] then a motion to dismiss for lack of personal jurisdiction under 12(b)(2) is appropriate. It is essentially this situation alone which justifies a motion under 12(b)(2) since almost any other objection will go to the manner of service rather than the power to exercise jurisdiction.

To contest application of a long-arm statute successfully, the defendant must show insufficient minimal contacts and that the exercise of jurisdiction would violate "fair play."[97] Where service is based on a federal statute, due process is satisfied so long as the defendant has minimum contacts with the United States.[98]

While Rule 4 controls service of the complaint, Rule 5 provides that other pleadings beyond the complaint, such as motions and other papers, are served on the attorneys in the case. Service on a

---

[95]Southern Pride, Inc. v. Turbo Tek Enterprises, Inc., 117 F.R.D. 566, 571 (M.D.N.D. 1987); cf. Federal Deposit Ins. v. Mt. Vernon Ranch, Inc., 118 F.R.D. 496, 500 (W.D. Mo. 1988).

[96]See International Shoe Co. v. Washington, 326 U.S. 310 (1945); World--Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[97]See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (discussed infra § 2.6).

[98]FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981); see also Clement v. Pehar, 575 F. Supp. 436 (N.D. Ga. 1983).

party is not allowed. The reason behind Rule 5 is that service on the attorney will speed the proceedings along.

c. Rule 12(b)(3): Venue.

Where there is improper venue, the court has the option of dismissing the action under 12(b)(3) or transferring it to any place where it could have been brought in accordance with 28 U.S.C. § 1404(a). The general venue provisions are applied without difficulty in most cases.

28 U.S.C. § 1391, whose provision concerning nationwide service on Government personnel was discussed above, is the general venue statute for actions against the United States, its agencies, and officers. It provides that suit in such cases may be brought where:

1. any defendant resides,

2. the cause of action arose,

3. any real property involved in the action is located, or

4. the plaintiff resides (if no property is involved).

Special venue rules are provided by 28 U.S.C. § 1402 for actions in district court for under $10,000 or based on the Federal Tort Claims Act. The former can only be brought by an individual plaintiff where he resides. The latter is brought where the plaintiff resides or where the act or omission complained of occurred.

Both § 1391 and § 1402 provide additional venue provisions for tax and property cases.

Under 28 U.S.C. § 1391, actions against private persons, such as Government personnel sued individually, whether based on diversity or federal question, may be brought where all defendants reside or where the claim arose, or, exclusively in diversity cases, where all plaintiffs reside.

d. Rule 12(b)(7): Indispensable Parties.

A motion to dismiss for want of an indispensable party is tied to Rule 19 which identifies a party as "needed for just adjudication" where (1) in his absence complete relief to the parties is not possible, or (2) he claims an interest whose protection will be impaired or impeded by his absence, or (3) he claims an interest and his absence will cause the parties to incur greater obligations. Use of 12(b)(7) by the Government is very infrequent. The following case in the standards of conduct area demonstrates that no party other than the United States is generally necessary to obtain complete relief where governmental action is concerned. It also illustrates the applicability of some of the issues previously discussed in this section.

DUPLANTIER v. UNITED STATES
606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1079 (1981)

AINSWORTH, Circuit Judge:

> At issue in this class action brought by federal judges is the complex legal question of whether an act of Congress--the Ethics in Government Act of 1978--insofar as its provisions require federal judges annually to file personal financial statements available for public inspection, is violative of the Constitution of the United States. . . . [W]e conclude that the Act is not unconstitutional.
>
> The Ethics in Government Act of 1978 was enacted to "preserve and promote the accountability and integrity of public officials. . . ." Title III is that part of the Act specially applicable to the federal judiciary and requires judges to file annually with the Judicial Ethics Committee a personal financial report. . . . In the original complaint plaintiffs named as sole defendant the United States of America. . . .
>
> On May 24, plaintiffs amended their complaint to name as defendants, in addition to the United States, Griffin B. Bell, individually and in his official capacity of

Attorney General of the United States; Judge Edward Allen Tamm, individually and in his official capacity as the chairman of the Judicial Ethics Committee, and the Judicial Ethics Committee. . . .

On June 4, the district court issued its memorandum opinion denying plaintiffs' motion for a preliminary injunction. The court held that although it had subject matter jurisdiction of the case under 28 U.S.C. § 1331(a), it lacked in personam jurisdiction of the Judicial Ethics Committee, Judge Tamm, its chairman, and the clerks of court; therefore, adjudication on the merits as to these parties was precluded. Section 1391(e), which provides for nationwide service of process in "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof" and which was relied upon by plaintiff to establish personal jurisdiction over Judge Tamm and the Committee, was held to apply only to the executive branch of government. . . . The court found that it had both subject matter and in personam jurisdiction over the defendants United States of America and Griffin B. Bell. However, the court held that the provisions of the Act "relegate the responsibilities of the United States, and more specifically, the Attorney General, to a secondary status," and that any relief it could grant plaintiffs against the Attorney General and the United States would therefore be "premature and incomplete." Accordingly, the district court refused to pass upon the merits of the case or the constitutionality of the Act. . . .

[T]he district court was correct in concluding that it lacked personal jurisdiction over Judge Tamm and the Judicial Ethics Committee. . . . The court erred, however, when it held that it could not pass upon the merits of the plaintiffs' motion for a preliminary injunction and decide the constitutional question presented.

Judge Tamm and the Judicial Ethics Committee are not indispensable parties requiring dismissal of this suit under Rule 19, Fed.R.Civ.P. See English v. Seaboard Coast Line R.R. Co., 465 F.2d 43 (5th Cir. 1972); Haas v. Jefferson National Bank of Miami Beach, 442 F.2d 394 (5th Cir. 1971). A judgment rendered in the absence of Judge Tamm and the Committee will not be prejudicial to their interests, and this court can render adequate relief to the parties before it.

The government argues that a judgment against the United States and the Attorney General will be inadequate as the Attorney General plays a secondary role in the enforcement of the Act since he merely brings suit for civil penalties against judges who fail to comply with the Act. The Judicial Ethics Committee and its chairman, Judge Tamm, the government argues, are charged with the primary responsibilities of developing the reporting forms, collecting the reports and disclosing them to the public.

> The government's argument runs into difficulty when the question is not the enforcement but the constitutionality of the Act. A single Act of Congress creates the duties of the Attorney General, the Judicial Ethics Committee, and Judge Tamm. The Act is not divisible--it cannot be constitutional for one of these parties to enforce the Act's financial reporting provisions if another cannot, and vice versa. This court may properly consider the constitutionality of the roles assigned to the Attorney General and the United States by the Act, and either validate or invalidate the Act. Therefore, since plaintiffs seek a ruling as to the constitutionality of the Act, and the United States and the Attorney General, parties charged with responsibilities under the Act, are before the court, the court can render adequate relief.

Rule 12(b)(7) might arise in an action for mandamus filed under 28 U.S.C. § 1361. However, it seems likely that a court would, like the court in DuPlantier, avoid the issue on the ground that the United States can still accord complete relief.

2.5 Judgment on the Pleadings and Summary Judgment.

a. Rule 12(c): Judgment on the Pleadings.

Rule 12(c) permits a motion for judgment on the pleadings to be filed after the pleadings are closed. Where a party fails to file a motion to dismiss under Rule 12(b) and instead answers, he may raise any defenses he preserved in his answer by a motion for judgment on the pleadings. A motion to dismiss, filed after answering, will be treated as a motion for judgment on the pleadings.[99]

By definition, judgment must be on the pleadings; nothing outside the pleadings can be considered. If outside matters are introduced, the court may treate the motion as one for summary

[99] E.g., Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980); Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 420 (W.D.N.C. 1987); United States v. City of Philadelphia, 482 F. Supp. 1274 (E.D. Pa. 1979), aff'd, 644 F.2d 187 (3d Cir. 1980).

judgment--just as a 12(b)(6) motion is converted when extrinsic evidence is offered to show failure to state a claim. Courts will treat a motion to dismiss as a motion for summary judgment when the motion to dismiss is filed before an answer. Courts have the option of rejecting extrinsic evidence if the pleadings themselves demonstrate that there is no issue of material fact.[100]

Judgment on the pleadings will be granted on the same grounds as summary judgment; the court must find that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. Again, the unique nature of judgment on the pleadings requires that the movant show that there is no material factual issue to be resolved, based only on the pleadings themselves.

Judgment on the pleadings serves at least two purposes. First, it can be used to raise one of the 12(b) defenses not raised before answer. In this respect, it is little more than a procedural device. Second, it can be used to obtain judgment on the merits in the rare case where the parties' pleadings agree on all the facts necessary for adjudication. In this way, judgment on the merits can be obtained easily and early in the proceedings.

b. Rule 56: Summary Judgment.

Pursuant to Rule 56(a), the defendant may move for summary judgment at any time.[101] However, a scheduling order entered pursuant to Rule 16 may limit the time for filing such motions. The defendant therefore has the option of declining to answer and may file a motion for summary judgment instead. The defendant can also answer and then file his motion.

[100]Sage Inter., Ltd. v. Cadillac Gage Co., 556 F. Supp. 381 (E.D. Mich. 1982).

[101]Fed. R. Civ. P. 56(b).

The plaintiff can also move for summary judgment, the only qualification being that the motion cannot be filed until 20 days after the beginning of the action. If the defendant moves for summary judgment first, the plaintiff cannot file a cross motion until at least 20 days after the defendant's motion.

Either party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[102] The burden to show the absence of a material fact is on the moving party.[103] Summary judgment is similar to a judgment on the pleadings, the only difference being that evidence outside the pleadings can be introduced in the motion for summary judgment. This evidence can be in the form of declarations,[104] affidavits, interrogatory responses, or virtually any other form of document. The declarations or affidavits must, of course, be based upon personal knowledge, must set forth admissible evidentiary facts, and must affirmatively show that the declarant is competent to testify to those facts.[105]

Rule 56 does not define material fact. The Supreme Court has defined it as a fact which "might affect the outcome of the suit."[106] It is fairly clear that it refers to facts that are material to the specific issues framed by the motion rather than those framed by the complaint as a whole.[107] The pleadings may raise several issues, but if the motion would resolve the case based on only one, then a dispute as to the facts of other issues unrelated to the grounds for this motion is irrelevant.

---

[102]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

[103]Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

[104]See 28 U.S.C. § 1746 (1994).

[105]Fed. R. Civ. P. 56(e); Sitts v. United States, 811 F.2d 736 (2d Cir. 1987); McNear v. Coughlin, 643 F. Supp. 566 (W.D.N.Y. 1986).

[106]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[107]Id.

Narez v. Wilson provides an example of how the summary judgment rule operates:

NAREZ v. WILSON
591 F.2d 459 (8th Cir. 1979)

STEPHENSON, Circuit Judge.

Plaintiff-appellant Michael C. Narez appeals from the trial court's grant of summary judgment to the defendant--appellees, United States Marine Corps. Inasmuch as the record reveals yet to be resolved issues of material fact, we reverse and remand to the trial court for proceedings not inconsistent with this opinion.

In stating the facts relevant to the appeal, we will adhere to the standards established for summary judgment:

> Where several possible inferences can be drawn from the facts contained in the affidavits, attached exhibits, pleadings, depositions, answers to interrogatories, and admissions on file, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.

City Nat'l Bank v. Vanderboom, 422 F.2d 221, 223 (8th Cir.), cert. denied, 399 U.S. 905 (1970), quoting from United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Narez enlisted in the Reserve Marine Corps on April 18, 1971, for a period of six years. When he enlisted, he signed an enlistment contract by which he acknowledged his obligation to attend weekend drills and annual active duty summer camp . . . . As a part of this agreement, Narez also assumed the responsibility of informing the military of his current address.

From the time of his enlistment until March 1975, Narez presumably satisfactorily fulfilled his military obligations. In the weekend drill of March 1975, however, the commanding officer of Narez' company, Captain Dudash, designated Narez as an "unsatisfactory" participant in each drill. The apparent reason for the unsatisfactory designation was that Narez' wig, although allegedly in compliance with Corps standards, did not conform to Dudash's grooming standards. The unsatisfactory rating continued even after Narez had twice cut the wig (between the Saturday morning and Saturday afternoon drills and prior to the Sunday morning drill) in an attempt to conform to Dudash's expectations. . . .

Narez appeared at the next regularly scheduled drill in April 1975; at that time Dudash allegedly told Narez that unless he got rid of the wig and cut his natural hair, Dudash would "activate" him to involuntary active duty. Narez's record shows that Narez did not appear for the next seven months of drills, nor did he appear for his required two weeks of active duty in July. In December 1975, Narez finally reappeared at drill. . . .

Narez appeared for the January 1976 drills, wearing a new wig which he contends conformed with Marine Corps standards. Dudash again marked Narez as an "unsatisfactory" participant on the basis that--according to Narez--the wig did not meet "Dudash's standards." At that time, Narez decided not to attend any future drills, and he was not present for the February, March and April 1976 drills.

During the next few months, several letters were written by Marine officials and sent to Narez explaining what action the Corps was going to take against him. All but one of these letters failed to reach Narez, however, and the Corps maintains Narez was the cause of this failure inasmuch as he had not kept the Marines advised of his most current address. . . .

[O]n April 28, 1976, the Corps sent to Narez a notice of its intent to recommend that Narez be ordered to involuntary active duty . . . on June 4, 1976, sent to Narez a notice of intent to recommend that he be administratively reduced to the rank of private; and on September 8, 1976, sent to Narez a second letter of intent to recommend that he be recommended for involuntary active duty. None of these letters ever reached Narez, and they were returned, marked "Unclaimed" or "Moved".

On November 1, 1976, Narez' order of assignment to involuntary active duty, effective November 30, was issued. . . . On November 12, 1976, the Corps located Narez at his place of employment and informed him of the order. Narez said he wished to contest the order. . . . On November 29, Narez's orders to report were personally delivered to him at his place of work, and on November 30, Narez failed to report as ordered.

Narez raises three primary issues on appeal. The only one necessary for us to discuss here is his contention that the pleadings, affidavits and depositions of the parties raise a genuine issue of material fact as to whether Narez was ordered to involuntary active duty, directly or indirectly, as a result of his wearing a regulation wig to weekend drills.

In a summary judgment situation, the court may consider admissions and facts conclusively established but all reasonable doubts touching the existence of a genuine issue as to material fact must be resolved against the movant.

* * *

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstance. . . . A summary judgment is an extreme remedy, and, under the rule, should be awarded only when the truth is quite clear. . . . And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment."

United States v. Farmers Mut. Ins., 288 F.2d 560, 562 (8th Cir. 1961), quoting from Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951). . . .

If, by reasonable inference from the facts, it could be concluded that by action of the Corps Narez was denied his constitutionally protected right to govern his personal appearance, directly or indirectly in violation of our decision in Miller v. Ackerman, supra, then the Corps, as the moving party, has failed to sustain its burden, and the order of summary judgment must be reversed.

This issue is a material one in that it goes to the heart of Narez' pleading; and a review of the record also discloses that there are sufficient facts that give rise to the inference that Narez suggests: (1) Narez' claim that he was marked unsatisfactory because of his wig, when Narez contends his wig conformed to Corps requirements; (2) the allegations that Dudash told Narez to get rid of his wig or Narez would be activated; (3) the Corps' change of recommendation from discharge (of which there is a review of an administrative board) to involuntary active duty (for which review by an administrative board does not exist); (4) the fact that Narez claims he at least twice requested MAST, but did not receive it; and (5) the delay in the order to activate Narez (Narez was absent from drills in May, June, July, August, September, October and November, 1975, and yet the Corps' notification to Narez of discharge or involuntary active duty did not come about until after the further dispute Narez had with Dudash over Narez' wig in January 1976). We do not list these factors as a comment upon the strength or weakness of Narez' case;

> we only point to these facts to illustrate that a reasonable inference can be drawn from these facts favorably for Narez.
>
> Thus, for the reason that a genuine issue as to a material fact exists in this case, we hold that this case is not an appropriate one for summary judgment. The purpose of summary judgment "is not to cut litigants off from their right of trial . . . if they really have evidence which they will offer on a trial[;] it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940).

That summary judgment cannot be granted if there is an issue as to a material fact implies that there can be no contest as to the facts. This is not correct. In the typical case, the complaint makes an allegation of fact that the defendant wishes to contest. The defendant moves for summary judgment and files a declaration, controverting the facts alleged in the complaint. It would appear at this point that there is an issue of fact. Once the defendant challenges the plaintiff's factual allegations with competent evidence to the contrary, however, the defendant is ordinarily entitled to judgment if the plaintiff fails to challenge the defendant's evidence with evidence of his own.[108]

Even when the movant's extrinsic evidence is unchallenged, the court must construe the motion in the most favorable light for the non-moving party.[109] Usually, however, the fact that his evidence is unchallenged will result in judgment for the defendant. To adequately counter the defendant's motion in these circumstances, the plaintiff must come forward with evidence equal in quality to the defendant's. Conclusory assertions of fact or generalized allegations are insufficient.[110]

---

[108] E.g., Boulies v. Ricketts, 518 F. Supp. 687. 690 (D. Colo. 1981) (uncontradicted prison officials' affidavits controverting prisoners' complaint entitled them to judgment).

[109] E.g., Fitzke v. Shappell, 468 F.2d 1072, 1077-78 (6th Cir. 1972).

[110] E.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236, 240 (4th Cir. 1988); Walter v. Fiorenzo, 840 F.2d 427, 434 (7th Cir. 1988); St. Amant v. Benoit, 806 F.2d 1294 (5th Cir. 1987); Smith v. Mack Trucks, Inc., 505 F.2d 1248 (9th Cir. 1974); Lovable Co. v. Honeywell, Inc., 431 F.2d 668 (5th Cir. 1970).

Where the defendant has introduced evidence on a motion for summary judgment and the plaintiff is unable to rebut it, the court may either find in favor of the defense, which is the more frequent result, or permit discovery to allow the party opposing the motion to obtain sufficient facts to counter it.[111] The result may depend on the nature of the parties. Pro se plaintiffs, for example, are given greater latitude. In such cases, the court will ensure that the plaintiffs' claims have had "fair and meaningful consideration."[112]

Courts are reluctant to grant summary judgment where there is a question of motive or intent, where facts necessary to resolution are in the movant's hands, or where different inferences can be drawn from undisputed facts.[113] Even where the affidavits on which a motion for summary judgment are based remain unopposed, summary judgment may be denied:

> When a moving party's affidavit raises subjective questions such as motive, intent or conscience, there may have to be a trial even where the non-moving party fails to present counter-affidavits since cross-examination is the best means of testing the credibility of this type of evidence.[114]

The Supreme Court has endorsed summary judgment as a means of disposing of cases in which immunity is raised in constitutional tort actions:

---

[111]See Habib v. Raytheon Co., 616 F.2d 1204, 1210 (D.C. Cir. 1980).

[112]Madyun v. Thompson, 657 F.2d 868, 876-77 (7th Cir. 1981).

[113]Sherman Oaks Medical Arts Center Ltd. v. Carpenter's Local Union 1936, 680 F.2d 594, 596-98 (9th Cir. 1982).

[114]Williams v. Burns, 540 F. Supp. 1243, 1248 (D. Colo. 1982). See also Via v. City of Richmond, 543 F. Supp. 382 (E.D. Va. 1982).

> "[D]amages suits [against public officials] concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."[115]

Complete or partial summary judgment can be given. Summary judgment is a judgment on the merits and can be appealed (although denial of a motion for summary judgment generally cannot absent consent of the court). Because summary judgment is on the merits, some confusion is caused when the ground asserted as the basis for judgment is one which does not normally go to the merits, such as jurisdiction. Rule 12(h)(3) provides that whenever jurisdiction appears to be lacking, the action should be dismissed. Whether "judgment" is given or a dismissal is ordered is important because the former forecloses a new suit while the latter does not. Stanley v. Central Intelligence Agency, a Federal Tort Claims Act case involving Army LSD testing, demonstrates how the Fifth Circuit views this issue.

STANLEY v. CENTRAL INTELLIGENCE AGENCY
639 F.2d 1146 (5th Cir. 1981), cert. denied, 483 U.S. 1020 (1987)

TUTTLE, Circuit Judge:

> Appellant James B. Stanley appeals from the district court's granting of summary judgment in favor of defendant. Appellant brought suit against the United States under the Federal Tort Claims Act . . . to recover for injuries sustained allegedly as a result of defendant's negligent administration of a chemical warfare experimentation program in which Stanley was a participant. The district court found that Stanley's injuries arose out of activity incident to military service and held, therefore, that the claim was barred by the Feres doctrine. . . .
>
> We find that the trial court correctly applied Feres and held the United States immune to all of Stanley's claims under the Federal Tort Claims Act, since all of his injuries arose while he was engaged in activity incident to his military service.

[115]Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982), quoting Butz v. Economou, 438 U.S. 478, 508 (1978).

However, we reverse the granting of summary judgment, as we find that, once having found the Feres doctrine applicable, the district court should have dismissed the case for lack of subject matter jurisdiction.

I. FACTS

In February, 1958, appellant was a Master Sergeant . . . stationed with his wife and children at Fort Knox, Kentucky. Responding to a posted notice, appellant volunteered to . . . [go to] Edgewood Arsenal. . . . There, during the course of clinical testing, he was given Lysergic Acid Diethylamide . . . without his knowledge.

Appellant claims that the defendants were negligent . . . in their administration of LSD to human subjects, their failure to obtain his informed consent to participate in the experiment, and their failure to debrief and monitor him after the test. Appellant claims that he suffered, as a result of this negligence, severe physical and mental injuries which caused him continual problems in the performance of his military duties and ultimately disrupted his marriage.

II. APPLICABILITY OF FERES

In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court considered the claims of three servicemen for recovery under the Federal Tort Claims Act for injuries sustained while they were on active duty. . . . The Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. . . . Despite the apparent harshness of the application of Feres to the facts before us, we are compelled to conclude that the trial court correctly applied Feres and held the United States immune to Stanley's suit. . . .

IV. GRANTING OF SUMMARY JUDGMENT

Appellant contends that even if the trial court was correct in finding that Feres applied to the facts of this case, the court erred in disposing of the case by way of summary judgment rather than dismissal for lack of subject matter jurisdiction. This contention is based on the notion that if Feres applies, a district court lacks subject matter jurisdiction because the Feres doctrine is a judicially created exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act and when the government has not consented to suit, the court has no subject matter jurisdiction to hear the claim. Appellant argues that once a court has determined that Feres applies, the court lacks subject matter jurisdiction, and, therefore, has no power to render a judgment on the merits of the case. Thus, he contends that the trial court in this case

had no power to grant summary judgment, which acts as a final adjudication on the merits, but should have dismissed the case without prejudice. . . . See generally 6 Moore's Federal Practice, para. 56.03, para. 56.26.

Appellant points also to cases holding that summary judgment is an extreme remedy which is proper only if the claimant is not entitled to recovery under any circumstances. . . . He contends that he has a separate theory of recovery based on the Constitution and 28 U.S.C. § 1331. See Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Appellant, therefore, asks this Court to reverse the granting of summary judgment and to remand with directions that the claim be dismissed for lack of subject matter jurisdiction and that the plaintiff be allowed to amend "to correct a defective allegation of jurisdiction," 28 U.S.C. § 1653. . . .

Courts have uniformly held that where conduct complained of falls within one of the statutory exceptions to the FTCA, the district court is without jurisdiction of the subject matter thereof. . . . We conclude that when a case under the Tort Claims Act falls within the bounds of Feres, a judicially created exception to the Act, the Court likewise has no jurisdiction to hear the case.

A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction. . . . When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim. . . . Since the granting of the summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction. See generally 10 Wright & Miller, Federal Practice and Procedure, § 2713, p. 402 et seq. Therefore, since a defense based on the Feres doctrine is premised on the notion that there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such defenses should be raised by a motion to dismiss for lack of subject matter jurisdiction rather than by a motion for summary judgment. . . . Accordingly, we conclude that the court below erred in granting summary judgment in favor of the United States and should have dismissed the case for lack of subject matter jurisdiction.

The government's arguments to the contrary are not persuasive. Appellees correctly state the rule that a district court must treat a 12(b)(6) motion for failure to state a claim as a motion for summary judgment where the trial court considers matters outside the pleadings. . . . However, a 12(b)(1) motion for lack of jurisdiction over the subject matter is not so converted. . . . A dismissal for failure to state a claim is a disposition on the merits. Since appellant's allegations should not have survived the 12(b)(1) jurisdictional attack of Feres, the court had no jurisdiction to dispose of the case on the merits by reaching the 12(b)(6) motion of

dismissal for failure to state a claim. . . . Therefore, the fact that the trial court in this case considered matters outside the pleadings fails to render his action in treating the Feres issue on a motion for summary judgment proper. . . .

The government also relies on several cases where the court affirmed the granting of summary judgment since subject matter jurisdiction was found lacking. See, e.g., Sherwood Medical Indust. v. Deknotel, 512 F.2d 724 (8th Cir. 1975); McDaniel v. Travelers Ins. Co., 494 F.2d 1189 (5th Cir. 1974) (per curiam). These cases, however, are not binding authority for the government's assertion that we should affirm the granting of summary judgment in this case. In the Sherwood case, the Eighth Circuit affirmed the granting of summary judgment because the court found there was no "actual controversy" as is required for a suit under the Declaratory Judgment Act. Summary judgment there was appropriate as the Declaratory Judgment Act does not of itself create jurisdiction so the court must have had another basis of jurisdiction in order to have reached the question of whether relief was available under the Declaratory Judgment Act. The McDaniel case was a suit brought within the admiralty jurisdiction of this Court. There, we affirmed per curiam the granting of summary judgment because the plaintiff had failed in his attempt to allege that a maritime contract existed or that defendants had breached it. The question of whether the trial court should have dismissed the case for lack of jurisdiction rather than granting summary judgment was not raised.

There are cases where courts have disposed of the Feres issue by way of summary judgments. . . . However, we have found no case which addresses the precise issue before this Court, or provides any reasoned explanation for why summary judgment can be an appropriate disposition of a case in which Feres applies. . . . There are numerous cases where the courts have granted motions to dismiss based on the Feres doctrine. . . . Moreover, in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), the Supreme Court found that the district court had properly dismissed the plaintiff's FTCA claims for lack of subject matter jurisdiction because Feres applied.

We conclude, therefore, that the only correct disposition of a case based on Feres is dismissal for lack of subject matter jurisdiction. . . .

While we approve the determination of the trial court that the plaintiff could not prevail on his complaint, we reverse the order granting summary judgment and remand for the consideration of the trial court of any amendment which the appellant may offer, seeking to cure the jurisdictional defect.

Summary judgment is frequently sought and often given in government litigation. In military cases, litigation often arises from administrative proceedings in which there is a record that the court is asked to review for substantial evidence or arbitrariness. Because there is no factual dispute, summary judgment is an appropriate vehicle. Determination of some uniquely government issues such as official immunity or the reviewability of military decisions are particularly well suited for summary judgment. Constitutional litigation, a major part of government practice, is also a candidate for summary judgment because the facts are often not in dispute or the parties are willing to stipulate a set of facts to get at the major issues.

When summary judgment is denied at the beginning of a case because the facts are disputed, the parties may go into discovery after which motions for summary judgment are frequently renewed.

2.6 Discovery.

a. Scope of Discovery.

Rules 26-37 govern discovery. Rule 26(a)(5) provides for the following discovery devices:

1. depositions (Rules 27, 28, 30-32),

2. interrogatories (Rule 33),

3. production of documents or things (Rule 34),

4. inspection or examination of persons or land or other property (Rules 34, 35), and

5. requests for admissions (Rule 36).

Generally, several discovery tools can be used in any sequence and the parties can discover one another simultaneously.[116]

The scope of discovery, contained in Rule 26(b)(1), is broad:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The two principal criteria of Rule 26(b)(1) that result in broad discovery are (1) that the matter be "relevant to the subject matter" of the action, and (2) that the information need not be admissible if it is reasonably calculated to lead to admissible evidence.

The party seeking discovery has the burden of demonstrating relevancy.[117] The standard for relevancy, however, is broader than that at trial.[118] Discoverable matter need only be relevant to the subject matter of the case and not to the specific legal issues or theories asserted in the pleadings.[119]

---

[116]Fed. R. Civ. P. 26(d).

[117]United States v. IBM, 66 F.R.D. 215, 218 (S.D.N.Y. 1974).

[118]Kerr v. United States Dist. Court for the N. Dist. of Cal., 511 F.2d 192 (9th Cir. 1975), aff'd, 426 U.S. 394 (1976).

[119]E.g., Duplan Corp v. Deering Milliken, Inc. 397 F. Supp. 1146, 1187 (D.S.C. 1974).

One narrow exception to the broad scope of discovery may be in actions based upon an administrative record. In these cases, discovery may be limited to that necessary to determine if there is a complete record.[120]

In 1980, the Supreme Court declined a recommendation to change the rules to limit discovery to facts relevant to the pleadings. Two years previously in Oppenheimer Fund, Inc. v. Sanders,[121] the Court stated:

> [D]iscovery is not limited to issues raised by the pleadings for discovery itself is designed to help define and clarify the issues. . . Nor is discovery limited to the merits of a case for a variety of fact oriented issues may arise during litigation that are not related to the merits.[122]

As Oppenheimer suggests, discovery helps to define the pleadings. The breadth of the discovery rules can only be understood fully when the linkage between the concept of notice pleading and discovery is appreciated:

> The relationship between the policy of pleading and that of discovery is obvious. The very purpose of permitting pleadings based upon good faith speculation must be to permit plaintiffs to employ the discovery provisions to determine whether a valid case in fact exists. If plaintiff had the resources and ability to ascertain all the facts without resort to the formal discovery process, there would be no need, of course, to permit any but the most specific allegations. Conversely, it would not matter that general pleadings sufficed if discovery could nevertheless be curtailed, thus preventing or hindering plaintiffs from ascertaining if, and on what facts, valid claims exist.

---

[120]Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 34 (N.D. Tex. 1981).

[121]437 U.S. 340 (1978).

[122]Id. at 351.

> From a theoretical point of view, the current practice of allowing general pleading and extensive discovery cannot seriously be challenged. There seems to be little reason why litigants should be prevented from establishing legitimate claims in actions in which the admissible facts are to be found only in the files and minds of opposing parties. Similarly, the Supreme Court should not give into charges of abuse by lawyers who, rather transparently, are merely acting as lobbyists for their particular clientele. The practical problems, however, are not so easily treated. There are cases in which extensive discovery results in costs well out of proportion to the dispute. Nevertheless, lawyers push on with their inquiries---not so much to build their fees, as is sometimes suggested, but to ensure that after the case is completed the lawyers will not be subjected to malpractice claims following the sudden appearance of favorable, hitherto undiscovered documents or testimony. The fact that some clients can afford such extensive discovery does not alter the fact that it often wastes both time and money.
>
> The inherent difficulty with proposals to limit the scope of discovery, however, is that they apply to every case, including those in which discovery will cover a broad base but will not necessarily be extensive and costly, those in which costly, time-consuming discovery is justifiable, and those in which limits should legitimately be imposed.[123]

Critics of liberal discovery practice argue that the periodic changes to the discovery rules have been insufficient to cure perceived abuses inherent in the system. The relatively limited scope of changes in 1980 led to this dissent from the adoption of the 1980 amendments by Justice Powell, joined by Justices Stewart and Rehnquist:

> [T]he most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled. There are wide differences of opinion within the profession as to the need for reform. The bench and the bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee [of the U.S. Judicial Conference which reported the changes] when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. . . . The Court's

[123]J. Friedenthal, A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure, 69 Calif. L. Rev. 806, 816-17 (1981).

adoption of these inadequate changes could postpone effective reform for another decade.

When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice." Herbert v. Lando, 441 U.S. 153, 179 (1979) (POWELL, J., concurring). Properly limited and controlled discovery is necessary in most civil litigation. The present Rules, however, invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds. Even in a relatively simple case, discovery through depositions, interrogatories, and demands for documents may take weeks. In complex litigation, discovery can continue for years. One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution of disputes. If there is disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies.

Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules. Indeed, the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, led by THE CHIEF JUSTICE, identified "abuse in the use of discovery [as] a major concern" within our legal system. Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system. . . .

The amendments to Rules 26, 33, 34 and 37 recommended by the Judicial Conference should be rejected, and the Conference should be directed to initiate a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation.[124]

---

[124]Amendments to the Federal Rules of Civil Procedure, reported in 85 F.R.D. 521 (1990) (Powell, J., Dissenting).

Advocates of liberal discovery contend that the system favors, rather than disadvantages, the small litigant and that narrowing the scope of discovery would favor the large corporate defendant.[125] On the other hand, the existing discovery rules often disfavor the Government while permitting the plaintiff tremendous latitude. In litigation challenging military decisions and programs, discovery is often a one-way street because the Government is in possession of most of the discoverable facts. Limitless discovery demands tax limited military resources, especially since "the presumption is that the responding party must bear the expense of complying with discovery requests."[126]

b. Judicial Management of Discovery.

Although the rules give the parties some latitude, the court's power to manage discovery, already strong, is increasing. Under the 1993 amendments to the Federal Rules of Civil Procedure, unless otherwise stipulated or directed by order or local rule, certain information must now be disclosed without waiting for a discovery request.[127] This preliminary disclosure must include:

1. identification of witnesses and the subjects of which they are knowledgeable;

2. a copy of all relevant documents or a description of these and all tangible things relevant to "disputed facts alleged with particularity in the pleadings";

3. a computation of damages and nonprivileged factual material related to the nature and extent of injuries suffered; and

---

[125]E.g., W.H. Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty First Century, reported in 76 F.R.D. 277, 288 (1977).

[126]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

[127]Fed. R. Civ. P. 26(a)(1).

4. a copy of any insurance agreement under which an insurance business may be liable to satisfy and potential judgment.

These disclosures must be made within 10 days after the discovery planning meeting mandated by Rule 26(f). Additionally the new Rules now impose a continuing duty to supplement or correct disclosures made under Rule 26(a)(1) or in response to requests for discovery. The 1993 amendment to the Federal Rules of Civil Procedure provided for a mandatory discovery planning meeting.[128] This meeting should be held at least 14 days prior to the Rule 16(b) scheduling conference. Parties must meet to discuss the nature and basis of their claims and defenses, the possibilities of settlement, and the mandatory disclosures required under Rule 26(a)(1). The parties must submit to the court, within 10 days after the meeting, a written report outlining a discovery plan.

The power to limit discovery or to set discovery schedules is potent. Acceleration of discovery[129] or cutting off discovery where the court believes that the parties have had sufficient time[130] can have dramatic impact on a party's ability to defend.

Moreover, discovery orders are not generally reviewable by mandamus or other means.[131] A party challenging a court's discovery decision has a heavy burden. "Matters of docket control and conduct of discovery are committed to the sound discretion of the district court."[132] A district court's

---

[128]Fed. R. Civ. P. 26(f).

[129]E.g., Transamerica Computer Co. v. IBM, 573 F.2d 646 (9th Cir. 1978).

[130]E.g., In re Knight, 614 F.2d 1162 (8th Cir. 1980), cert. denied, 449 U.S. 823 (1980).

[131]Barclaysamerican Corp. v. Kane, 746 F.2d 653, 654 (10th Cir. 1984); Cleveland v. Krupansky, 619 F.2d 572, 575 (6th Cir. 1980), cert. denied, 449 U.S. 834 (1980).

[132]In re Fine Paper Antitrust Litigation, 685 F.2d 810, 817 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983).

decisions regarding case management will be reversed only on "the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant."[133] The challenging party has "to demonstrate that the court's action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible."[134]

An undesirable but nevertheless available appeal route is by inviting a contempt judgment for refusing compliance with a discovery order. In Marrese v. American Academy of Orthopaedic Surgeons,[135] an antitrust defendant obtained review of an order to turn over membership lists after being held in contempt for disobeying the order. In reviewing the contempt judgment and order, the court explained the competing interests at stake in deciding whether or not to permit discovery appeals:

> Such an order may impose heavy and irrevocable costs on a party; yet to make discovery orders appealable as of right would lead to unacceptable delays in federal litigation. Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method of identifying the most burdensome discovery orders. . . .[136]

Although some authority suggests that the Government can appeal when it is a nonparty and must claim a governmental privilege, this position is not uniformly accepted.[137]

---

[133]Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1105 (5th Cir. 1972), cited in id. at 817.

[134]Id. But cf. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212-13 (3d Cir. 1984) (district court order limiting period of discovery to 60 days deemed an abuse of discretion).

[135]706 F.2d 1488 (7th Cir. 1983).

[136]Id. at 1493.

[137]E.g., Newton v. NBC, Inc., 726 F.2d 591, 593 (9th Cir. 1984).

The 1983 Supreme Court amendments to the rules increase the court's power to control discovery, especially in cases where parties overuse discovery. The amendment to Rule 26(b) allows discovery to be limited by the court if:

1. it is unreasonably duplicative or cumulative,

2. it is obtainable from a more convenient, less burdensome, or less expensive source,

3. there has already been ample opportunity in the action to seek the information, or

4. discovery would be unduly burdensome or expensive.

This adds a new dimension to Rule 26(c) which previously allowed relief only from discovery that would cause annoyance, embarrassment, oppression, or undue burden or expense. The change to Rule 26(b) also sets standards for determining whether discovery is burdensome or expensive, requiring the balancing of the needs of the case, the amount in controversy, the resources of the parties, and the importance of the issues at stake. An additional tool to police discovery is Rule 26(g) which permits sanctions against attorneys or parties who sign discovery requests that do not comply with the rules. The 1983 change offers substantial opportunities for government litigants to limit plaintiffs' discovery by seeking protective orders when the circumstances described in Rule 26 arise.

c. Protective Orders, Orders to Compel, Sanctions.

A protective order may preclude, limit, or modify the discovery sought.[138] Moreover, protective orders may apply not only to parties but to others with a connection to the suit, such as a

[138]Fed. R. Civ. P. 26(c).

party's expert witness.[139] Protective orders are disfavored. Consequently, the party seeking the protective order bears a substantial burden of showing entitlement.[140] Under the amended Rule 26(c), the moving party must now certify that it has conferred or attempted to confer with other parties to resolve any dispute without court action.

In government litigation, undue burden or expense is the most frequent ground used to support a motion for a protective order. Once the party seeking discovery shows the relevance of the material sought, however, the costly or time consuming nature of the request becomes irrelevant.[141] When forced to respond to a burdensome or costly request, a party may move in the alternative for an order conditioning discovery on the requesting party's payment of the costs.[142]

Although a party seeking discovery is in a favored position generally, Herbert v. Lando[143] suggests that there should be a limit to the indulgence paid to the discovering parties. There, Lieutenant Colonel Anthony Herbert sued CBS for slander based on a film account of his charges about Vietnam atrocities. Herbert attempted to compel answers to deposition questions which one of the defendants refused to answer on first amendment grounds. The district court issued a protective order precluding the questions. The Court upheld the protective order, stating:

---

[139]E.g., Quinter v. Volkswagen of America, 676 F.2d 969, 972 (3d Cir., 1982).

[140]Kiblen v. Retail Credit Co., 76 F.R.D. 402, 404 (E.D. Wash. 1977).

[141]Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976). Cf. Isaac v. Shell Oil Co., 83 F.R.D. 428, 432 (E.D. Mich. 1979) ("Where a plaintiff has shown not even reasonable grounds to support his allegations of liability, and where the discovery costs faced by the defendant are substantial, justice requires that a protective order be granted.")..

[142]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

[143]441 U.S. 153 (1979).

> The Court has more than once declared that the deposition--discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. Schlagenhauf v. Holder, 379 U.S. 104 (1964) 114-115. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947). But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action." (Emphasis added). To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.[144]

Typically, government agencies are reluctant to part with their records. When forced to do so in discovery, agencies often desire to limit access to discovered materials to opposing counsel. While access of opposing parties, as opposed to counsel, can be controlled, it cannot easily be blocked.[145] General public access to discovered material can be barred, but only if it is essential to shield a party from substantial and serious harm.[146] A protective order issued in these circumstances must be narrowly drawn and there can be no alternative means of protecting the public interest.

Orders to compel discovery, which follow a showing of entitlement to the information denied the requesting party, are supported by an array of sanctions in Rule 37 including:

1. an order establishing as fact the matters which were sought in discovery,

---

[144]Id. at 177.

[145]Doe v. District of Columbia, 697 F.2d 1115 (D.C. Cir. 1983).

[146]In re Halkin, 598 F.2d 176 (D.C. Cir. 1979); see also In re Korean Air Lines Disaster, 597 F. Supp. 621 (D.D.C. 1984); In re Agent Orange Product Liability Litigation, 100 F.R.D. 735 (E.D.N.Y. 1983) (protective orders issued against release of documents to news media).

2. an order precluding introduction of matters by the nonresponding party or refusing to allow him to support or oppose claims or defenses,

3. an order striking all or part of pleadings,

4. a stay of further proceedings,

5. dismissal,

6. judgment of default, and/or

7. payment of reasonable expenses including attorney's fees.

While Rule 37 permits the court to impose the full panoply of sanctions, including dismissal, for a party's failure to appear for his own deposition, or for his failure to answer interrogatories or requests for production, in practice sanctions are generally not imposed until an order compelling compliance with discovery requests has been made and disobeyed.[147] The amended Rule 37 now includes the requirement that the moving party have conferred or attempted to confer with the person against whom relief is sought. This rule also applies to sanctions imposed on a nonparty under Rule 45.[148]

One problem for corporate and government attorneys responding to discovery is that they must rely on others within their respective bureaucracies for information and support. When a failure to comply with a discovery order is "due to inability and not to bad faith, or any fault of" a party, sanctions

[147]But see Alsup v. International Union of Bricklayers and Allied Craftsmen of Toledo, Ohio, Local Union No. 3, 679 F. Supp. 716, 721 (N.D. Ohio 1987) (court may impose sanctions prior to order compelling compliance where initial discovery request is clear).

[148]E.g., Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494-95 (9th Cir. 1983).

are not appropriate.[149] In Potlatch Corp. v. United States,[150] the Government failed to provide an expert appraisal by a court-ordered discovery deadline. The court refused to allow introduction of the appraisal or the testimony of the expert. On appeal, the imposition of the sanction was reversed. The court of appeals held that intragovernmental delays in getting Department of Justice approval to hire the expert should have been considered by the court: "The facts of bureaucratic delay and red tape, which, while certainly not to be encouraged, cannot be ignored."[151]

There are, however, limits to courts' willingness to excuse bureaucratic barriers:

BRADLEY v. U.S.
866 F.2d 120 (5th Cir. 1989)

Before KING, WILLIAMS, and SMITH, Circuit Judges.

PER CURIAM:

Plaintiffs Dirk and Cynthia Bradley appeal from a take-nothing judgment entered after a bench trial on their claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671 et seq., against the United States for medical malpractice. We conclude that the government purposefully disregarded--indeed, had a policy of disregarding--its duties under the Federal Rules of Civil Procedure, the district court's own local rules, and the court's pretrial order seasonably to identify for the Bradleys the expert witnesses whose testimony it intended to present at trial. For that reason, we vacate and remand.

. . . .

II.

[149]Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

[150]679 F.2d 153 (9th Cir. 1982).

[151]Id. at 156.

The Bradleys, after complying with the notice provisions of the FTCA by filing an administrative claim on March 29, 1981, filed the instant suit on March 5, 1984, alleging that the government's doctors negligently scheduled and performed Brad's delivery by cesarean section. On July 17, 1984, the Bradleys served upon the government interrogatories which requested, inter alia, that the government identify "each expert witness whose opinion the Defendant intends to present at []trial," and all of the articles, journals, books, or other sources which the government or its experts intended to assert as authoritative.

The government responded to the interrogatories on September 18, 1984. In answer to the Bradleys' request that it identify its expert witnesses, the government stated: "The Defendant has not selected an expert at this time." Similarly, in response to the Bradleys' request that it identify all authoritative secondary sources which it intended to use at trial, the government, after identifying a standard medical treatise on obstetrics, J. Pritchard & P. MacDonald, Williams Obstetrics (1976), stated that, because it "has not selected an expert at this time [] it has therefore not yet selected any articles, journals or other publications as authoritative." These answers were never subsequently altered or amended.

On January 17, 1985, the court ordered that, in accordance with local rules, the parties were to prepare and present to the court a pretrial order by June 10, 1985, and that the case be set for trial on June 24, 1985. The parties submitted a pretrial order to the court on June 10, 1985, in which the government, having been ordered to list all of the expert witnesses it intended to call at trial, again failed to identify any expert witnesses.

Although both parties appeared before the court on June 24, 1985, and announced their readiness to go to trial, the trial was postponed and rescheduled for March 24, 1986, with a joint pretrial order due on March 14, 1986. Neither party amended the joint pretrial order previously submitted to the court, and no new pretrial order was filed; on March 17, 1986, the trial was postponed a second time until July 21, 1986. Finally, on May 22, 1986, the trial was postponed a third time until February 2, 1987, with a joint pretrial order due January 16, 1987.

At no time during these various postponements did either party seek to amend the pretrial order submitted on June 10, 1985, and no new pretrial order was filed prior to the February 2, 1987, trial date. On January 23, 1987, however, the government moved to designate two expert witnesses--a Dr. Alvin Brekken and a Dr. William R. Bernell--out of time. The Bradleys, while filing papers opposing the government's motion, quickly deposed the two witnesses.

On Monday, February 2, 1987, both parties appeared, ready for trial. Although they stated that under the circumstances they did not want the trial to be postponed yet a fourth time, the Bradleys continued to oppose the government's motion. Noting that the Bradleys already had deposed the two witnesses, however, the court granted the government's motion and allowed Brekken and Bernell to testify.

After the trial, the court rendered judgment for the United States. In its findings of fact and conclusions of law, the court concluded that the Bradleys had failed to prove both that the Air Force doctors were negligent in scheduling Brad's delivery and that the doctors' actions were the proximate cause of his handicaps. The Bradleys appeal, contending (1) that the court erred by granting the government's motion to designate the two expert witnesses and allowing them to testify, and (2) that the court's factual findings are clearly erroneous.

III.

> Under Fed.R.Civ.P. 26(e)(1), a party has a duty seasonably to supplement [its] response [to a request for discovery] with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

Even the government itself admits that, at least as to Bernell, it breached this rule; moreover, there is little question that the government failed to comply with both the local rules of the district in which the case was tried and the court's pretrial order, both of which required it to designate its expert witnesses within a certain period.

The breach having been established, the only question remaining is that of remedy. While the government moved to designate the two expert witnesses out of time, the Bradleys moved to exclude the witnesses under rules 16(f) and 26(e)(1). On the first day of trial, the court, after discussing the factual circumstances underlying the motions with counsel, ruled from the bench that the two experts would be allowed to testify. It is this ruling which the Bradleys contest.

Regardless of whether we treat the court's ruling as an amendment of the pretrial order under rule 16(e) or a refusal to impose sanctions upon the government for violating rule 26(e)(1), it is apparent that we must review the court's ruling under the "abuse of discretion" standard. The trial court's discretion, however, is to be guided by the consideration of four factors: (1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify;

(3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness. See Murphy, 639 F.2d at 235. Based upon our analysis of these factors, we conclude that this is one of those rare cases in which we are compelled to hold that the trial court abused its discretion by allowing Brekken and Bernell to testify.

. . . .

According to the government, its failure to notify the Bradleys of its expert witnesses in accordance with the federal and local rules and the court's pretrial order was the result of budgetary constraints and bureaucratic policy. As the Assistant United States Attorney trying the case explained orally to the district court, and to this court in writing, each United States Attorney's Office is provided with litigation funds, which can be used, inter alia, to hire consultants to assist in the preparation of a case. In this case, both Brekken and Bernell were hired as consultants, with Brekken delivering a written report to the government in June 1984--well before the government responded to the Bradleys' interrogatories--and Bernell delivering a written report in June 1985, before the original pretrial order was failed in the district court.

Funds for the payment of expert witnesses, however, are maintained centrally at the Department of Justice. Once an Assistant United States Attorney who wishes to use an expert at trial obtains permission from the Department of Justice, funds for the payment of that witness are restricted in the expert witness account, and are no longer available for use by any other Assistant United States Attorney, even though the trial for which the expert is designated may not occur for some time. Assistant United States Attorneys therefore are encouraged not to "tie up" those funds until reasonably sure that the case in which the expert will testify is going to trial in the immediate future.

This policy of delaying the designation of expert witnesses, the government states, was particularly important during the time in which this case was pending. Because of severe budgetary problems, United States Attorneys' offices were instructed to forego a number of expense-generating activities; at the same time, district judges were instructed that, for a period of time, they could not proceed with any jury trials because funds were not available.

Thus, the government states, it did not supplement its responses to the Bradleys' interrogatories or designate Brekken and Bernell in the original pretrial order because it was Justice Department policy not to do so until trial was imminent. It does contend that it nonetheless informally notified the Bradleys in June 1985 of its intention to use Brekken as an expert witness, see supra; it offers no explanation, however, for its failure to inform them of its intention to use Bernell.

Even if we receive the government's explanation at face value, we simply cannot accept "bureaucratic necessity" as an excuse for purposefully disregarding the rules by which all parties must operate when appearing before federal district courts. All parties are expected to conform their conduct to these rules, or face sanctions for their failure to do so; this is even more true for the federal government, a party that regularly appears before the federal courts, knows the rules by which they operate, and is even at times a special beneficiary of those rules. Although we are sensitive to the conditions under which the various United States Attorneys' offices operate, these conditions do not and cannot justify policies that are predicated upon a disregard of the power of federal courts and the rights of opposing parties, both of which are embodied in the federal rules, the local rules, and court orders.

By allowing Brekken and Bernell to testify, the district court left the government's breach of its duties unsanctioned; moreover, its silence in the face of the government's conduct can be interpreted as an imprimatur. Indeed, the letter submitted by the United States Attorney to this court suggests that the government has interpreted the district court's silence as precisely that, insofar as the letter indicates that the same policies are still in effect.

We will not allow that imprimatur to exist any longer. We hold that, under the circumstances of this case, the district court abused its discretion by allowing the government to designate Brekken and Bernell out of time and to offer their testimony. Moreover, we are hopeful that this decision will serve as a catalyst for appropriate changes in the above-described policies, to the extent that such policies still deter adherence to the applicable rules.

IV.

Having determined that the district court erred in allowing the government to present the testimony of Brekken and Bernell, we must now decide how the case should proceed.

. . .

[W]e think it best to put the parties into the position in which they would have been had the government complied with the rules and seasonably notified the Bradleys of its intention to call Brekken and Bernell. To do so, we first remand the case to the district court for a new trial on all issues, at which the government may present the testimony of Brekken and Bernell. Before the new trial is begun, of course, the district court should consider any further appropriate discovery and

should allow the parties to prepare the presentation of their cases in light of the two experts' expected testimony.

Second, on remand the district court, pursuant to its inherent power to enforce its own rules, . . . should impose sanctions upon the government for the breach of its duties under the rules. In its discretion, the court may consider, for example, requiring the government to compensate the Bradleys and their counsel for their expenses attributable to the government's conduct. Sanctions are necessary not just to compensate the Bradleys, but to ensure that the government's conduct does not go unpunished, as it would if the case were remanded merely for a new trial. See Perkinson v. Gilbert/ Robinson, Inc., 821 F.2d 686, 689-90 (D.C. Cir. 1987) (affirming the imposition of monetary sanctions for violation of rule 26(e)(2)).

We thus VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion. [footnotes omitted]

Where a discovery order could have been obeyed, attorneys should be aware that sanctions can be imposed against them personally as well as against the client.[152] In Litton Systems, Inc. v. American Telephone and Telegraph,[153] relevant notes were found in the desk of in-house counsel, and defendant in the antitrust case moved to dismiss. Noting that it is difficult to "visit upon the client the sins of counsel, absent the client's knowledge, condonation, compliance or causation," the court refused to impose the ultimate sanction of dismissal. Rather, plaintiff was not allowed to recover the attorney's fees incurred.

[152]See Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647 (9th Cir. 1982); Hawkins v. Fulton County, 96 F.R.D. 416, 421 (N.D. Ga. 1982) (order requiring attorney to pay opponent's costs connected with discovery order).

[153]700 F.2d 785 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

On the other hand, in Damiani v. Rhode Island Hospital,[154] the court affirmed dismissal of an antitrust complaint as a sanction for noncompliance with discovery orders, despite the fact that plaintiff's counsel took full responsibility for failure to comply with the order to compel:

> The day has long since passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience. The processing of cases must proceed expeditiously if trials are to be held at all.
>
> * * *
>
> The argument that the sins of the attorney should not be visited on the client is a seductive one, but its siren call is overborne by the nature of the adversary system.
>
> > . . . Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is deemed to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 U.S. 320, 326 [1879]. . . .
>
> Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1920) (footnote omitted). As Justice Harlan points out. . . keeping a suit alive "merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant." Id. at 634 n. 10. . . .[155]

Of particular interest to government attorneys is United States v. Sumitomo Marine & Fire Ins. Co.[156] In this admiralty case, the court imposed a personal fine of $500 on the government's counsel and precluded the United States from introducing evidence of its damages due to the repeated failure of the United States to meet court imposed discovery deadlines. The court was unimpressed with

---

[154]704 F.2d 12 (1st Cir. 1983).

[155]Id. at 17 (emphasis added).

[156]617 F.2d 1365 (9th Cir. 1980).

the government's argument that the failure to comply was more the result of serious understaffing than of bad faith and specifically stated that one purpose of the personal fine was "to deter government counsel from further disobedience of court orders."[157]

Application of sanctions, like all discovery matters, is within the discretion of the district court. Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,[158] was a diversity case in which jurisdiction was obtained through the Pennsylvania long arm statute. The defendant insurer sought summary judgment, claiming lack of personal jurisdiction on the ground that it had no contacts with the forum. The court ordered the defendant to comply with the plaintiff's demand for information concerning defendant's possible state contacts. Upon the defendant's failure to comply, the court applied Rule 37 and held that the facts of jurisdiction would be taken as established. The Supreme Court approved this result, concluding that discovery sanctions could go so far as to estop a defendant from claiming lack of personal jurisdiction. The Court also explained that "Rule 37 contains two standards -- one general and one specific. . . . First, any sanction must be 'just;' second, the sanction must be specifically related to the particular claim which was at issue in the order to provide discovery."[159]

Sanctions serve not only to penalize, but to deter:

---

[157]Id. at 1371.

[158]456 U.S. 694 (1982).

[159]Id. at 707. See also Lew v. Kona Hospital, 754 F.2d 1420, 1425-27 (9th Cir. 1985); Shearson Loeb Rhoades, Inc. v. Quinard, 751 F.2d 1102 (9th Cir. 1985); Givens v. A. H. Robins Co., 751 F.2d 261 (8th Cir. 1984).

NATIONAL HOCKEY LEAGUE v. METROPOLITAN HOCKEY CLUB
427 U.S. 639 (1976)

Per Curiam.

This case arises out of the dismissal, under Fed. R. Civ. P. 37, of respondents' antitrust action against petitioners for failure to timely answer written interrogatories as ordered by the District Court. The Court of Appeals for the Third Circuit reversed the judgment of dismissal, finding that the District Court had abused its discretion.

The District Court . . . summarized the factual history of the discovery proceeding in these words:

> "After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions."

The Court of Appeals did not question any of the findings of historical fact which had been made by the District Court, but simply concluded that there was in the record evidence of "extenuating factors." The Court of Appeals emphasized that none of the parties had really pressed discovery until after a consent decree was entered between petitioners and all of the other original plaintiffs. . . . It also noted that respondents' counsel took over the litigation, which previously had been managed by another attorney, after the entry of the consent decree, and that respondents' counsel encountered difficulties in obtaining some of the requested information. The Court of Appeals also referred to a colloquy during the oral argument on petitioners' motion to dismiss in which respondents' lead counsel assured the District Court that he would not knowingly and willfully disregard the final deadline. . . .

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright

dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts. Under the circumstances of this case, we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents. . . . Therefore, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is reversed.

---

d. Privileges.

As noted above, the scope of discovery extends to "any matter, not privileged, which is relevant to the subject matter." Thus, a claim of privilege prevents disclosure of the information in question until the court resolves the issue. Privilege is an issue to be determined according to federal law under Fed. R. Evid. 501 where a federal claim is in issue.[160] Among the several traditional privileges, executive privilege is one of the most important. United States v. Nixon,[161] notwithstanding, the Supreme Court firmly recognizes the privilege with respect to military and state secrets:

[160]Sirmans v. South Miami, 86 F.R.D. 492 (S.D. Fla. 1980).

[161]418 U.S. 683 (1974).

UNITED STATES v. REYNOLDS
345 U.S. 1 (1953)

Mr. Chief Justice Vinson delivered the opinion of the Court.

These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B-29 aircraft. . . .

The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members, and three of the four civilian observers were killed in the crash.

The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged. . . . the Secretary of the Air Force filed a formal "Claim of Privilege." This document . . . stated that the Government further objected to production of the documents "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a "classified nature."

The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37(b)(i), that the facts on the issue of negligence would be taken as established in plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. . . .

The judgment in this case imposed liability upon the Government by operation of Rule 37, for refusal to produce documents under Rule 34. Since Rule 34 compels production only of matters "nonprivileged," the essential question is whether there was a valid claim of privilege under the Rule. We hold that there was. . . .

We think it should be clear that the term "not privileged" as used in Rule 34, refers to "privileges" as that term is understood in the law of evidence. When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence. . . .

Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. . . .

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. . . .

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. . . .

The decision of the Court of Appeals is reversed. . . .

Discovery litigation often involves protecting classified information. Classified information is governed by Executive Order 12958, which contains a detailed definition of classified information as well as other provisions dealing with classification authority and procedures for handling classified information.[162] The state secrets privilege described in United States v. Reynolds (discussed supra in subsection d), has long been recognized at common law, and encompasses matters whose disclosure reasonably could be expected to cause damage to the national security, such as military or foreign affairs secrets. Although the Reynolds court expressly relied on the common law, part of that opinion, and other cases as well, suggest that the privilege has a constitutional basis founded on the President's duties in the areas of national security and foreign affairs.[163]

Even when state secrets are relevant to a litigant's case, the litigant's need must give way to the Government's desire for secrecy. To successfully invoke the privilege, the Government need only satisfy the court that there is a reasonable danger that production of the desired evidence would expose matters which, in the interest of national security, should not be divulged. Once it is established that state secrets are involved, the privilege is absolute. The litigant's need is relevant only to establish how closely the court will examine the validity of the assertion of privilege.[164]

In Halkin v. Helms,[165] plaintiffs sought damages from several Government officials alleging that the officials had illegally intercepted plaintiffs' international communications. The court of appeals upheld the district court's order dismissing the case, holding that to require defendants to admit or deny whether

---

[162]Exec. Order 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C.A. § 401 (1991).

[163]See United States v. Reynolds, 345 U.S. 1, 6 n. 9 (1953); United States v. Nixon, 418 U.S. 683, 708 (1974); Black v. Sheraton Corp. of America, 564 F.2d 531, 541 (D.C. Cir. 1977); J. Weinstein & M. Berger, 2 Weinstein's Evidence para. 509 (1985).

[164]See supra § 2.6d; see also Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).

[165]598 F.2d 1 (D.C. Cir. 1979).

plaintiffs' communications had been intercepted would reveal the Government's capability to collect foreign intelligence, information which constituted a state secret.

The assertion of a state secrets privilege must be made by a formal claim in an affidavit (or declaration under 28 U.S.C. § 1746) by the head of the department that has control over the information (the originating department, under E.O. 12356) after actual, personal consideration of the information by the head.[166]

The case of United States ex rel. Touhy v. Ragen,[167] established the rule that as long as a subordinate employee of an Executive branch department is directed by a superior, under procedures or regulations promulgated by the department, not to provide testimony, then no contempt charges could be brought against the employee. Regulations promulgated pursuant to the rule are termed Touhy regulations and may be invoked when classified information is sought from a present or former employee of a department not party to the litigation. Touhy regulations have been promulgated for the Department of Defense[168] and the Department of Justice.[169] Of course, in order for the department to ultimately withhold the employee's testimony, a valid claim of privilege must be made at some point.[170]

A successfully established claim of privilege will lead to dismissal if the plaintiff cannot prove a prima facie case without the privileged material,[171] or if the risk of inadvertent disclosure of the material

---

[166]United States v. Reynolds, 345 U.S. 1, 8 (1953).

[167]340 U.S. 462 (1951).

[168]32 C.F.R. §§ 97.1-.6 (1999).

[169]28 C.F.R. §§ 16.21-.29 (1999).

[170]NLRB v. Capitol Fish Co., 294 F.2d 868, 873 (5th Cir. 1961).

[171]Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

during the litigation is too great.[172]

Unlike criminal litigation, to which the Classified Information Procedures Act (CIPA) applies,[173] there is no comprehensive set of statutory rules for the handling of classified information in civil cases. The Department of Justice does have regulations that deal with physical security of classified information at issue in a lawsuit.[174] Also, protective orders, pre-trial evidentiary hearings, and in camera and ex parte reviews of classified information by the court may be available under regular civil procedure rules.[175]

The Freedom of Information Act (FOIA)[176] is frequently used as a discovery device in litigation against the federal government. There is a specific exemption, however, from disclosure under FOIA for classified information.[177]

---

[172]Farnsworth-Cannon v. Grimes, 635 F.2d 268 (4th Cir. 1980) (en banc); see also Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 147 (1981), citing Totten v. United States, 92 U.S. 105 (1875) (public policy requires dismissal of any case whose trial would disclose military secrets); accord Halkin v. Helms ("Halkin I"), 598 F.2d 1 (D.C. Cir. 1978); Halkin v. Helms ("Halkin II"), 690 F.2d 977 (D.C. Cir. 1982); Jabara v. Kelly, 476 F. Supp. 561, 578 (E.D. Mich. 1979); Kinoy v. Mitchell, 67 F.R.D. 1 (S.D.N.Y. 1975). But see Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984).

[173]18 U.S.C. app. 3 (1985 & Supp. 1999).

[174]28 C.F.R. § 270 (1999).

[175]See supra § 2.6c.

[176]5 U.S.C. § 552 (1996 & Supp.1999).

[177]Id. at § 552(b)(1). See, e.g., Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981); Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980); see also Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982).

In addition to military and state secrets, "confidential intra-agency advisory opinions . . . are privileged" in order to support a "policy of frank discussion between subordinate and chief concerning administrative action."[178] The major problem in day-to-day litigation in this area is the requirement that the privilege be asserted personally by the head of the agency, as indicated by this representative case:

COASTAL CORPORATION v. DUNCAN
86 F.R.D. 514 (D. Del. 1980)

MURRAY M. SCHWARTZ, District Judge.

> This Court is once again faced with determining whether a department of the Federal Government has properly invoked its claims of privilege. In this case, the Secretary of the Department of Energy ("DOE") has purported to properly assert the executive privileges pertaining to "pre-decisional" and "investigatory" information, and the attorney-client and work product privileges, with respect to approximately 600 documents requested by plaintiffs, Coastal Corporation and Cities Service Company ("plaintiffs") in interrogatories and requests for production of documents. . . .
>
> On February 19, 1979, plaintiffs' first set of interrogatories and requests for production were served on DOE. . . . Defendant's time for response was extended until April 19, 1979, at its request. However, on the day the responses were due, the government filed a motion to stay discovery. On April 23, plaintiffs filed a motion for sanctions. Following a status conference on May 2, in which counsel for the government was advised that it lacked the power to grant itself a stay, the government still failed to file any response to discovery prior to the hearing on plaintiffs' motion for sanctions on July 17, 1979. Finally, on July 23, 1979 . . . the government filed its responses that are the subject of this motion to compel. . . . Included with the July 23 responses was the affidavit of F. Scott Bush, Acting Assistant Administrator for Regulations and Emergency Planning of the Economic Regulatory Administration ("ERA") of the Department of Energy. In this affidavit, Bush asserted, on behalf of the DOE, the "government's privilege protecting pre-decisional, internal documents of a recommendatory or deliberative nature." . . .

[178]Kaiser Aluminum and Chemical Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958), cited in Environmental Protection Agency v. Mink, 410 U.S. 73, 86-87 (1973). See also Kerr v. United States Dist. Court for the N. Dist. of Cal., 426 U.S. 394 (1976); Molerio v. F.B.I., 749 F.2d 815, 820-22 (D.C. Cir. 1984).

The starting point for determining whether executive privilege has been properly invoked is the Supreme Court's decision in United States v. Reynolds, 345 U.S. 1 (1953). . . .

Although Reynolds only discussed the executive privilege for military and state secrets, the courts have consistently applied these requirements to all claims of executive privilege, including those asserted here by the DOE. . . .

While not disputing that the claim of executive privilege must be invoked by an affidavit of the head of the department with control over the matters in question . . . DOE contends that this responsibility may be delegated by the agency head to a subordinate. In the instant case, David Bardin, Administrator, ERA, entered a . . . delegation order . . . giving the Assistant Administrator for Regulations and Emergency Planning of ERA (Bush) the authority "to assert evidentiary privilege . . ." This order further provided, "[t]he authority delegated to the Assistant Administrator for Regulations and Emergency Planning may be further delegated, in whole or in part, as may be appropriate." Id. On July 19, Bardin also instructed Bush that the review of the documents was to be in accordance with guidelines requiring, inter alia, personal and careful consideration as to each document, segregation of portions of documents which could be released and consistency of action among various civil actions. DOE contends that Mr. Bardin, as Administrator of ERA, was himself given the authority to assert privilege on behalf of the ERA by . . . 10 C.F.R. 1001.1, Appendix, in which the Secretary delegated to the ERA Administrator the authority to "adopt rules, issue orders . . . and take such other action as may be necessary and appropriate to administer" the functions of the ERA. . . .

The DOE . . . points to language in . . . Amoco Production Co. v. DOE, 1 (CCH) Energy Management 9752 (D.Del. 1979). Judge Stapleton stated that one of the "formal requirements" which an agency must meet when it asserts executive privilege [is] the privilege must be claimed by the head of the agency after personal consideration." Id. at 9930. The Court then added the following footnote:

> This does not necessarily mean that the Secretary must personally inspect each document as to which executive privilege is claimed, so long as he establishes guidelines of sufficient specificity. . . .

[T]his language does not support DOE's assertion of privilege in this case. The Secretary has not merely failed to personally examine all of the documents claimed to be privileged; he has not looked at any of the documents. Moreover, the Secretary has not established any guidelines dealing with the assertion of privilege; his general delegation order referred to above makes no mention of privilege. Under

the terms of Bardin's delegation order, Bush was given authority only to assert privilege when documents were requested of the ERA and not on the behalf of the entire Department of Energy. . . . Thus, it cannot be said there has been an assertion of privilege on behalf of the DOE pursuant to any guidelines established by the Secretary. Finally, and perhaps most important the DOE's mechanism for asserting privilege fails to comport with the policy interests behind the requirement that the agency head assert the privilege after personal consideration. These interests . . . include the need for consistency and careful consideration in the assertion of privilege, an exception to the usually broad scope of discovery. "To permit any government attorney to assert the privilege would derogate both of those interests. It would be extremely difficult to develop a consistent policy of claiming the privilege." Pierson v. United States, 428 F. Supp. at 395.

The actions of the DOE and its attorneys in this case amount to a claiming of the pre-decisional executive privilege by the DOE's attorneys. Following Mr. Bush's assertion of privilege, DOE attorneys reviewed the documents claimed to be privileged and determined, without participation by Mr. Bush, that a number of these documents were not privileged. Thus, Bush's decision was in effect overruled by DOE attorneys. Requiring the agency head to claim the privilege assures the Court, which must make the ultimate decision, that executive privilege has not been lightly invoked by the agency, United States v. Reynolds, supra, and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged. . . .

In addition to failing to satisfy the requirement that executive privilege be raised by the head of the agency, the DOE has failed to comply with two other requirements. First, a claim of executive privilege must specifically designate and describe the documents. . . . The DOE has provided little information in both document indices submitted concerning the contents of each document claimed to be privileged. Second, the DOE has failed to proffer "precise and certain" reasons for preserving the confidentiality of the requested documents. . . . While Mr. Bush's affidavit states several conclusory reasons for withholding all the documents marked "PD" on the indices, no effort has been made to indicate why particular documents must be kept confidential. The DOE's failure to comply with these two requirements prevents the Court from assessing the harm resulting from disclosure against plaintiffs' need for the information. . . .

For all the reasons stated above, it is held that the executive privilege for pre-decisional documents was improperly invoked by the DOE. . . .

Having found that the DOE has improperly invoked executive privilege . . . the Court must determine whether to compel the immediate production of these

documents or to accept the DOE's offer to "further substantiate" its claims of privilege. . . . I conclude that immediate production of documents is required. . . .[179]

Material gathered in anticipation of litigation-the work product privilege—is explicitly recognized in Rule 26. Any consideration of the work product privilege must begin with a discussion of Hickman v. Taylor.[180] On February 7, 1943, the tugboat "John M. Taylor" sank, killing five of the nine crewmen, including Norman Hickman. Three days after the sinking and before any claim or lawsuit had been filed, the owners of the tug hired a lawyer to defend whatever litigation might eventually arise. The attorney interviewed the survivors of the tug's crew and obtained signed statements from them. Additionally, he interviewed other potential witnesses and prepared memoranda of the substance of some of these interviews. Seven months after the tug sank and some four to five months after the attorney had interviewed the witnesses, Norman Hickman's administrator brought suit against the owners of the tugboat and another party.

During discovery, attorneys for the plaintiff sought copies of the statements taken by Taylor's lawyer in the course of his pre-suit investigation. The defendant objected to the discovery request, and ultimately the matter was argued in the Supreme Court. In a unanimous opinion, the Supreme Court denied discovery and articulated what has become known as the "attorney work product privilege."

Writing for the court, Mr. Justice Murphy observed:,

---

[179]Compare Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980) with Department of Energy v. Brett, 659 F.2d 154 (Temp. Emer. Ct. App. 1981), cert. denied, 456 U.S. 936 (1982) (holding that executive privilege need be claimed only by officials with personal knowledge about the documents at issue--not necessarily the agency head).

[180]329 U.S. 495 (1947).

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. . . . Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.[181]

In his concurring opinion, Mr. Justice Jackson noted more bluntly, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on the wits borrowed from the adversary."[182]

In denying plaintiff discovery of the witness statements and memoranda, the Court did not fashion a rule of absolute privilege. The Hickman decision noted that relevant and privileged facts were discoverable when the facts were essential to the preparation of the case.[183] The Court added, however, that the burden of making a showing of necessity was on the party seeking discovery. Noting that the plaintiff already had the facts he needed, the Court found an insufficient showing of necessity had been made and refused to order the documents produced.

Several facets of the Hickman decision need to be emphasized. Initially, note that the documents sought by the plaintiff were generated by a factual investigation conducted by defendant's attorney. Additionally, the investigation was conducted well before any lawsuit was filed. Moreover, even the signed statement of the witnesses were exempt from production absent a showing of substantial need. Thus, the Court announced a qualified immunity for a lawyer's work product and permitted discovery of such materials only upon a substantial showing of necessity.

---

[181]Id. at 510.

[182]Id. at 516.

[183]Id. at 511.

The Hickman decision did not resolve all issues concerning the scope and applicability of the work product privilege and subsequent lower court decisions were not consistent.[184] Against this backdrop the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure undertook to revise the Federal Rules of Civil Procedure to eliminate much of the confusion surrounding this aspect of discovery. After several drafts and proposals, Rule 26(b)(3) was adopted by the Supreme Court in 1970.

Essentially, the 1970 amendments to the Federal Rules eliminated the requirement to seek a court order to compel production of documents generally. In order to preserve the special protection afforded work product materials, however, Rule 26(b)(3) permitted such discovery "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The rule also clarified that the work product privilege encompasses documents and materials prepared by the party himself or by his agent as well as those items prepared by his attorney.

Thus, under Rule 26(b)(3), three tests must be satisfied in order to assert the work product privilege. Material sought must be: (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or by or for that other party's agent, attorney, or representative. The first and third elements of the test are relatively straightforward. Little difficulty is encountered in determining whether a particular item of information is a "document or tangible thing" within the meaning of Rule 26(b)(3). Despite the express language of the rule, courts have recognized that "[w]ork product consists of the tangible and intangible material which reflects an attorney's efforts at investigating, assembling of information, determination of the relevant facts, preparation of legal theories,

[184]See, e.g., 8 Wright & Miller, Federal Practice and Procedure: Civil § 2022 (1970) [hereinafter Wright & Miller].

planning of strategy, and recording mental impressions."[185] The "extension" of the protection to intangible materials no doubt stems from the admonition in Rule 26(b)(3) for the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" when the required showing has been made and privileged documents are ordered disclosed.

While the Hickman decision dealt solely with information developed by an attorney investigating an incident on behalf of his client, the 1970 amendments to Rule 26(b)(3) clearly extended the work product protection to individuals other than attorneys. In commenting on this aspect of the Rule, the Advisory Committee noted,

> Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.[186]

Thus, the fact that an investigation was conducted and information developed by non-lawyers does not remove it from the protection of the work product doctrine.[187]

The aspect of the work product privilege that has spawned the most litigation is whether the documents sought were prepared "in anticipation of litigation or for trial." Rule 26(b)(3) unequivocally

---

[185]In Re Grand Jury Subpoena dated November 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980) (emphasis supplied). See also Shelton v. American Motors, Corp., 805 F.2d 1323 (8th Cir. 1986).

[186]Fed. R. Civ. P. 26(b)(3) advisory committee notes.

[187]See, e.g., Carver v. Allstate Ins. Co., 94 F.R.D. 131, 133 (S.D. Ga. 1982) (holding Rule 26(b)(3) "notably expands the [work product] doctrine by extending discovery protection to the work product of a party or his agents and representatives, as well as that party's attorney"); Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702 (S.D.N.Y. 1979) ("work product protection, if applicable here, lies in favor of the party, its lawyer and agents").

provides that only documents prepared in anticipation of litigation or for trial are entitled to the work product protection. The question of whether a given document was prepared in anticipation of litigation is one of fact. One court has framed the issue as, "whether in the light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation."[188] Thus, documents prepared in the ordinary course of a party's business are not entitled to work product protection.[189] The absence of a pending lawsuit at the time the documents were prepared will not preclude the application of the work product privilege if some specific claim has arisen that makes the anticipation of litigation reasonable.[190] Indeed, the Hickman case itself dealt with witness statements that were taken well before a lawsuit was filed.

The party asserting the work product privilege has the burden of establishing the existence of the privilege. Once the applicability of the privilege to the documents in question has been established, the party seeking discovery can obtain disclosure only by showing that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent . . . by other means."[191] Mere allegations of hardship are insufficient to overcome the privilege; the hardship must be demonstrated by the submission of evidence.[192] As the Third Circuit has explained in an oft quoted passage:

> In other words he must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take

[188]Galambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 472 (N.D. Ind. 1974).

[189]Fed. R. Civ. P. 26(b)(3) advisory committee notes.

[190]United States v. Exxon, 87 F.R.D. 624, 638 (D.D.C. 1980).

[191]Fed. R. Civ. P. 26(b)(3).

[192]In re LTV Securities Litig., 89 F.R.D. 595, 613 (N.D. Tex. 1981).

> advantage of his adversary's industry in seeking out and interviewing prospective witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case. As Justice Jackson aptly said in his concurring opinion in the Hickman case, 329 U.S. at page 516, 67 S.Ct. at page 396, 91 L.Ed. 451, in commenting on the petitioner's argument that the Rules were intended to do away with the old situation where a law suit developed into a battle of wits between counsel, 'a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.'[193]

The attorney-client privilege is also available in government litigation. While it is often functionally related to the work product privilege, it differs in several respects. It is stronger because it cannot be overcome by a showing of substantial need. It is weaker because disclosure of the otherwise privileged data to a person outside the attorney-client relationship waives the privilege. Disclosure of work product to third parties does not automatically waive that privilege.[194] Use of the protected documents to refresh a witness' recollection before a deposition, however, may be found to waive the privilege.[195]

Either privilege can be overcome where the material at issue was prepared to commit a crime or tort, such as fraud.[196] Related to this is the recognition by some courts that counsel's unprofessional conduct may waive at least the work product privilege even where the conduct was legal.[197]

---

[193]Alltmont v. United States, 177 F.2d 971, 978 (3rd Cir. 1950), cert. denied, 339 U.S. 967 (1950); see also Hauger v. Chicago, Rock Island & Pacific R.R. Co., 216 F.2d 501, 506-508 (7th Cir. 1954); First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 166 (E.D. Wis. 1980).

[194]Transamerica Computer Comp., Inc. v. IBM Corp., 573 F.2d 646, 647 n.1 (9th Cir. 1978); GAF v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979).

[195]Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982); see also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), aff'd in part and rev'd in part on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

[196]See In re Grand Jury Subpoenas, 561 F. Supp. 1247, 1251, 1258 (E.D.N.Y. 1982).

The attorney-client privilege applies in the government setting to communications between administrative personnel and government attorneys and to communications between agency attorneys and Department of Justice Attorneys.[198] The attorney-client privilege requires that the communication be in connection with a legal opinion or the obtaining of legal services. Consequently, nonlegal communications, such as those that often pass between commanders and their judge advocates, may not be protected.[199]

In addition to these privileges, materials can also be protected where release would compromise constitutional rights.[200]

(..continued)

[197]See, e.g., Moody v. IRS, 654 F.2d 795, 799-801 (D.C. Cir. 1981) and 682 F.2d 266, 268 (D.C. Cir. 1982) (on second appeal after remand); Parrott v. Wilson, 707 F.2d 1262, 1270-72 (11th Cir. 1983), cert. denied,464 U.S. 936 (1983).

[198]See Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982) aff'd 734 F.2d 18 (1984); see also Upjohn Co. v. United States, 449 U.S. 383 (1981) (discussing the limits of the attorney-client privilege when applied to corporate employees below the corporate management level).

[199]See United States v. Loften, 518 F. Supp. 839, 846-47 (S.D.N.Y. 1981); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 517-18 (D. Conn. 1976), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37-40 (D. Md. 1974) (documents which discuss business matters rather than legal issues are not protected). See generally Gaydos, The SJA as the Commander's Lawyer: A Realistic Proposal, The Army Lawyer, Aug. 1983, at 14; Note, The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government, 62 B.U. L. Rev. 1003 (1982).

[200]E.g., International Union, U.A.W. v. National Right to Work Legal Defense and Educ. Found., Inc., 559 F. Supp. 569 (D.D.C. 1983) (first amendment); Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) (fifth amendment).

e. Discovery Devices.

Having discussed the practice rules that govern discovery generally, we can examine the particular features of each method individually.

(1) Depositions.

Depositions may be taken before the action to perpetuate testimony.[201] After the action begins, they may be taken of any person, including a party.[202]

To take a deposition, a party gives reasonable notice to the other parties.[203] Once a deposition has been "noticed," it can only be blocked by an order of the court. The party opposing the deposition cannot delay it by merely filing a motion for a protective order.[204] The amended Rules 30 and 31 limit the number of depositions that can be taken in a case. Leave of the court or agreement is required before all plaintiffs or all defendants may take more than 10 depositions. Notice is all that is required to depose a party to the case. While notice to counsel is required for the deposition of a non-party, the witness must be subpoenaed to compel his attendance. A deposition can be taken anywhere a witness can be found. Deposition subpoenas can be obtained under Rule 45(a)(2) in the district where the deposition will be taken. Witnesses can only be examined where they reside, within 100

[201]Fed. R. Civ. P. 27.

[202]Fed. R. Civ. P. 30(a).

[203]Fed. R. Civ. P. 30(b)(1).

[204]FAA v. Landy, 705 F.2d 624, 634-35 (2d Cir. 1983), cert. denied,464 U.S. 895 (1983).

miles from where they reside, or in the state in which the trial is held.[205] At least one case, however, required a corporate defendant to produce its employees in England for depositions to be held there.[206]

The deposition is taken under oath before an officer authorized to administer oaths and is recorded stenographically or by other means agreed upon by the parties, such as by videotape.[207] Local court rules will determine whether transcripts of depositions are filed with the court.

The Federal Rules of Evidence apply at depositions and evidence objected to is taken subject to the objections made.[208] The party seeking the deposition may be present and examine the deponent orally or the party can submit written questions to the officer taking the deposition who will read the questions to the deponent and record his responses.[209] If the deponent is a party, he can be required under Rule 34 to produce documents at the deposition.[210] Pursuant to a 1991 amendment, Rule 45(a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. Under Rule 32, depositions can be used in court against a party who was present or had reasonable notice:

1. to contradict or impeach the deponent,

2. for any purpose permitted by the Federal Rules of Evidence.

---

[205]Fed. R. Civ. P. 45(c)(3)(A).

[206]Tietz v. Textron, Inc., 94 F.R.D. 638 (E.D. Wis. 1982).

[207]Fed. R. Civ. P. 30(b)(4).

[208]Fed. R. Civ. P. 30(c).

[209]Fed. R. Civ. P. 31.

[210]Fed. R. Civ. P. 30(b)(5).

3. for any purpose where the deposition was of a party or a representative of a government agency (when the deponent was sent as the agency representative),

4. for any purpose if the witness is dead, more than 100 miles from the trial, incapacitated, or where the party cannot obtain the witness by subpoena, or

5. for other reasons in the interest of justice.

(2) Interrogatories.

Interrogatories are served only on parties. Answers, which are to be made within 30 days, are signed by the person making them and objections are signed by the attorney. It has not been a ground for objection that the information sought is already known to the requestor or that it is a matter of public record.[211] The 1993 amendment to Rule 33 limits to twenty-five the number of written interrogatories that may be served upon any other party without leave of the court or written stipulation.

Responses to interrogatories cannot be delayed until a complete answer is available if a partial answer is possible.[212] Moreover, answers must be supplemented with regard to any question about persons knowing discoverable matters or the identity and expected testimony of expert witnesses.[213]

---

[211]See Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2d Cir. 1975); Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494 (S.D.N.Y. 1958).

[212]Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).

[213]Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980), cert. denied, 450 U.S. 918 (1981).

Supplemental responses are also necessary where a previous response was incorrect when made or is no longer true.[214]

Under Rule 33(d), the party has the option to permit the requestor to inspect and copy business records if they contain the answers sought. This option assumes that both parties would have an equal burden in finding the answer.[215] Further, the producing party has an obligation to specify in sufficient detail where, within these documents, the information can be found.[216]

(3) Production of Documents.

Like interrogatories, a demand for the production of documents under Rule 34 can only be served on another party. Documents in the possession of nonparties can be reached by a subpoena under Rule 45(a)(1). In order to keep a party that has many documents, like the Government, from hiding the needle in the haystack, one of the 1980 amendments to the rules requires the producing party to produce documents "as they are kept in the usual course of business or . . . organize and label them to correspond with the categories in the request."[217] The rule does not permit a search of government documents that is excessively broad and general.[218]

---

[214]See Fed. R. Civ. P. 26(e).

[215]Fed. R. Civ. P. 33(d). See also Rainbow Pioneer v. Hawaii-Nevada Investment Corp., 711 F. 2d 902 (9th Cir. 1983).

[216]Pulsecard, Inc. v. Discover Cards Services, Inc., 168 F.R.D. 295 (D. Kan. 1996).

[217]Fed. R. Civ. P. 34(b).

[218]United Presbyterian Church v. Reagan, 557 F. Supp. 61, 63-64 (D.D.C. 1982), aff'd, 738 F.2d 1375(D.C. Cir. 1984).

(4) Other Discovery Tools.

Physical and mental examinations must be ordered by the court. Examination may be of any party or person whose condition is in controversy.[219] The remaining discovery device is a request for admissions in which a party is asked to admit to the truth (in the pending action only) of statements or opinions of fact or the application of law to fact, to include the genuineness of documents.[220] When a request for admission is made, the responding party must answer in 30 days or the matter is deemed admitted. A motion to stay the request may suspend the 30 day period until the court decides the motion.[221]

The obligation to respond to discovery does not always stop with the initial response to the opposition. Although Rule 26(e) does not generally require supplementation of a discovery response if it was complete when made, supplementation is required where a party (1) knows that the response was either incorrect at the time or has since become incorrect, or (2) the party has decided to call additional expert witnesses at trial or has learned of persons with knowledge of discoverable matters not previously disclosed (whether or not they will testify). Where a party is unaware that previously discovered information has changed, new and different evidence should be admissible despite an earlier innocent failure to disclose.[222] Of course, the parties may agree to supplement beyond the relatively limited requirements of Rule 26(e).

---

[219]Fed. R. Civ. P. 35.

[220]Fed. R. Civ. P. 36.

[221]Graham v. Three or More Members of Six Member Army Reserve General Officer Selection Board, 556 F. Supp. 669, 672 (S.D. Tex. 1983), aff'd, 723 F.2d 905 (5th Cir. 1983), cert. denied, 466 U.S. 939 (1984).

[222]E.g., Bunch v. United States, 680 F.2d 1271, 1280 (9th Cir. 1982) (motion to strike in-court testimony of Air Force decisionmakers denied although it differed from telephone depositions because there was no knowing concealment).

2.7 Habeas Corpus Procedure.

Under 28 U.S.C. § 2241, habeas corpus is available to a "prisoner" who is:

1. in custody under or by color of the authority of the United States,

2. committed for trial in a United States Court, or

3. in custody in violation of the Constitution or federal law.

There are a number of procedural routes for military personnel to challenge allegedly unlawful retention in service or unlawful prosecution or sentence of a court-martial. Habeas corpus is one device that is available in such cases. The nature of habeas corpus jurisdiction and the standard of review applied by the courts will be further discussed in chapters 4 and 8. The purpose of this section is to introduce the procedural aspects of the habeas corpus remedy so that it can be distinguished from the civil action that may be brought in its stead to enjoin or require government action.

The essential prerequisite for a petition for habeas corpus (as opposed to complaint) is that the petitioner (as opposed to plaintiff) be in custody or committed for trial. Servicemembers claiming unlawful retention are clearly in custody for the purposes of 28 U.S.C. § 2241,[223] as are accused in courts-martial.[224] A military prisoner on probation is also in custody.[225] The issue of custody becomes of greater significance in determining whether the court has jurisdiction over the habeas petition.

---

[223]Parisi v. Davidson, 405 U.S. 34 (1972).

[224]E.g., Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974) (prisoners sentenced by summary courts-martial); Allen v. VanCantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971) (prisoner

footnote continued next page

Jurisdiction exists wherever the petitioner is in custody and the petitioner's custodian is located. Whether the petitioner is in custody in the district is less important than if the custodian is present.[226] In order for the writ to be effective, the custodian must be subject to the jurisdiction of the court; otherwise, the custodian is arguably free to ignore the court's order.[227]

Who and where the custodian is located is problematic in unlawful retention cases. Being on temporary duty in a state in which one's commanding officer is not located deprives the court of jurisdiction.[228] Similarly, a soldier cannot file a petition in a district through which he passes during a permanent change of station.[229] The petition can be filed anywhere someone in the petitioner's chain of command is located. Therefore, the District of Columbia is an appropriate forum for military personnel generally and especially for personnel stationed overseas, since the Secretary of the Army is viewed, at least judicially, as being in the chain of command.[230]

Generally, if an individual is subject to military control in a specific place, his assignment on paper to another command or officer, such as a reserve control group or the service chief of personnel,

---

(..continued)
awaiting trial); Bowman v. Wilson, 514 F. Supp. 403 (E.D. Pa. 1981), rev'd on other grounds, 672 F.2d 1145 (3d Cir. 1982) (pretrial confinement in E.D. Pa., trial to be held at Ft. Dix in D.N.J.).

[225]Small v. Commanding General, 320 F. Supp. 1044 (S.D. Cal. 1970), aff'd, 448 F.2d 1397 (9th Cir. 1971).

[226]See generally Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

[227]See Scott v. United States, 586 F. Supp. 66 (E.D. Va. 1984).

[228]Schlanger v. Seamans, 401 U.S. 487 (1971).

[229]Piland v. Eidson, 477 F.2d 1148 (9th Cir. 1973).

[230]Ex parte Hayes, 414 U.S. 1327 (1973) (order of Justice Douglas transferring case to D.D.C. because Secretary of the Army and DCSPER located in the district).

may be ignored and the district where he is physically located will exercise jurisdiction on the theory that there is a custodian within the jurisdiction.[231] In cases involving reservists, a "significant contacts" test is applied. Hence, the petition can be filed in the district where he receives official mail from the Army and where he resides.[232] Once jurisdiction attaches, it continues even if the servicemember departs.[233]

The application or petition for a writ of habeas corpus is verified by the petitioner or counsel. In addition to stating the facts concerning custody, it must identify the person, as opposed to the entity, who has custody.[234]

Once the petition is filed, the court has the option of either granting it immediately or issuing an order to the custodian to show cause why it should not be granted.[235] The court is not required to issue the order to show cause within any particular time period. Once issued, however, the respondent must make a return to the petition and answer to the order to show cause within three days. The statute allows for the return date to be extended up to twenty days.

The return to the order to show cause is supposed to demonstrate the reason why the petitioner is in custody. The facts averred in the return and answer are taken as true in the absence of a traverse (reply of the petitioner) or exception of the court.[236] Especially in court-martial cases, success

---

[231]E.g., Miller v. Chafee, 462 F.2d 335 (9th Cir. 1972).

[232]Strait v. Laird, 406 U.S. 341 (1972).

[233]United States ex rel. Bailey v. Commanding Officer, 496 F.2d 324 (1st Cir. 1974); Gregory v. Laird, 326 F. Supp. 704 (S.D. Cal. 1971).

[234]28 U.S.C. § 2242 (1994).

[235]28 U.S.C. § 2243 (1994).

[236]28 U.S.C. § 2248 (1994).

or failure will turn on the record that underlies the return and answer.[237] A hearing follows the return, ostensibly within five days. The petitioner may file a traverse to the respondent's return. Denial of any of the facts in the return must be under oath (or under penalty of perjury, if the traverse relies upon a declaration under 28 U.S.C. § 1746).

Petitioners may file multiple petitions although the court may decline to entertain subsequent petitions if it appears that the legality of the petitioner's detention has previously been determined by a federal court and no new ground is raised.[238] If a previous court held an evidentiary hearing, petitioner has the added burden to show that the new ground underlying his petition was not deliberately withheld previously.[239]

Under 28 U.S.C. § 2242, the rule relating to amendment of pleadings apply to the petition. Otherwise, the Rules are applicable to habeas corpus only to the extent (1) "that the practice in such proceedings is not set forth in statutes of the United States," and (2) "that the practice in habeas proceedings has, up to the time of the adoption of the Fed. R. Civ. P. . . . conformed to the practice in civil actions."[240] When considering a habeas petition, the inapplicability of some of the rules should be considered. For example, the discovery rules have been held inapplicable to habeas proceedings,[241] although 28 U.S.C. § 2246 allows the petitioner to serve interrogatories to affiants in habeas actions. On the other hand, rules pertaining to time limits for appeal from certain court decisions contained in the

---

[237]See Blackledge v. Allison, 431 U.S. 63, 83-84 (1977) (Powell, J., dissenting).

[238]28 U.S.C. § 2244(a) (1994).

[239]28 U.S.C. § 2244(b) (1994).

[240]Fed. R. Civ. P. 81(a)(2). Compare Rule 11, Rules Governing Section 2254 cases in the United States District Court (rule applicable to habeas cases involving state convictions unless inconsistent with the § 2254 rules).

[241]Harris v. Nelson, 394 U.S. 286 (1969).

rules do apply in habeas actions.[242] Practically, the court hearing the petition has the discretion to apply any of the rules as appropriate.

[242]Browder v. Director, Dept. of Correction, 434 U.S. 257, 269-72 (1978).